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October 7, 2009

BY HAND DELIVERY

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

OCT - 7 2009

Part of
Public Record



Re: STB Finance Docket No. 35299, Borough of
Riverdale -- Petition for Declaratory Order and
Stay

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned matter are an original and ten copies of "Reply of The New York, Susquehanna and Western Railway Corporation to Petition of Borough of Riverdale for Declaratory Order and Stay." Also enclosed is a CD containing the text of the brief and attachments. Please date-stamp the extra copy of the filing and return to our representative.

Sincerely yours,


Robert M. Jenkins III

RMJ/bs

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35299

**BOROUGH OF RIVERDALE, NEW JERSEY—PETITION
FOR DECLARATORY ORDER AND STAY**

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**REPLY OF THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION TO PETITION OF
BOROUGH OF RIVERDALE FOR DECLARATORY ORDER AND STAY**

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DATED: October 7, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 35299

**BOROUGH OF RIVERDALE, NEW JERSEY—PETITION
FOR DECLARATORY ORDER AND STAY**

**REPLY OF THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION TO PETITION OF
BOROUGH OF RIVERDALE FOR DECLARATORY ORDER AND STAY**

The New York, Susquehanna and Western Railway Corporation ("NYS&W") replies here to the Petition for Declaratory Order and Stay ("Petition") filed September 22, 2009, by the Borough of Riverdale, New Jersey ("Borough"). The STB should reject both the Borough's request that the STB initiate a declaratory order proceeding and the Borough's request for a stay.

The issues presented by the Borough's Petition are under the active jurisdiction and consideration of the Superior Court of New Jersey in *Borough of Riverdale v. New York Susquehanna and Western Railway Corporation*, Docket No. MRS-L-2297-96, and the Court has not requested any assistance from the STB in resolving those issues. Indeed, at a hearing on September 16, 2009, the Court determined that NYS&W had made a prima facie showing that local zoning regulation of NYS&W's planned brick transloading operations in the Borough is preempted, and the Court *rejected* the Borough's argument that those operations should be stayed pending the Borough's effort to initiate a declaratory order proceeding at the STB. *See* Transcript of 9/16/09 Hearing (attached as Exhibit 6), pp. 60-61.

Aside from the fact that the Court has already denied the stay sought by the Borough, the STB has no authority to enjoin NYS&W or any other railroad from constructing or operating a transload facility. In fact, the STB has held that it has no regulatory jurisdiction over the specific

transload facility at issue here. *See Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna and Western Railway Corporation*, 4 S.T.B. 380, 384-85, 387 (1999).

The STB does have jurisdiction, in appropriate cases, to initiate a declaratory order proceeding to “terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e) and 49 U.S.C. § 721. But this is not a case in which there is any “controversy” or “uncertainty” that could justify the STB initiating a proceeding. NYS&W intends to operate a brick transload operation in a rail facility which it owns and controls, using its wholly-owned subsidiary and agent, Susquehanna Bulk Systems, Inc.—which currently operates railroad transload facilities for NYS&W in Sparta, New Jersey, and North Bergen, New Jersey. The planned operation falls squarely within the type of railroad transload operation that the courts and the STB have repeatedly held qualifies as “transportation by rail carrier[]” within the meaning of the express preemption provision of the ICC Termination Act (“ICCTA”), 49 U.S.C. § 10501(b). There are no legal or factual issues that require any explication or analysis, much less justify the institution of a declaratory order proceeding.

The Borough’s Petition should be denied.

BACKGROUND

1. NYS&W and its predecessors have conducted interstate freight rail operations in and through the Borough of Riverdale for over 100 years. NYS&W is a common carrier railroad and its rail operations, like all interstate freight rail operations across the country, are subject to the exclusive jurisdiction of the STB under the ICCTA. 49 U.S.C. § 10501(b).

2. In 1995-96, NYS&W constructed a facility on its right-of-way in Riverdale to handle transloading of corn syrup from rail cars to trucks—for subsequent delivery to customers in the New York/New Jersey metropolitan area. Taking advantage of a preexisting rail siding

(which had historically been used as a team track to transload a wide variety of commodities) and ready access for trucks to nearby highways, NYS&W added additional rail tracks, plumbing and electrical facilities, a truck weighing scale, asphalt paving, perimeter fencing and lighting, storm water drainage, and improved an existing station building for office use. NYS&W also added specialized plumbing and electrical facilities required to heat corn syrup that had cooled in transit or while temporarily stored at the transload facility, so that the corn syrup could be piped into trucks when the time came to deliver it to a customer. NYS&W contracted with Bulkmatic, a trucking and logistics firm, to operate the transload facility. Bulkmatic also provided the tank trucks that delivered the corn syrup transferred from the rail cars.

3. The Borough of Riverdale opposed NYS&W's construction and operation of a transload facility, primarily on the ground that the facility was located in an area zoned for residential use. NYS&W advised the Borough that the transload facility was located entirely on NYS&W's right-of-way and that the application of its zoning restrictions to the railroad's right-of-way was preempted by the ICCTA. NYS&W indicated its willingness to furnish Borough officials information necessary to evaluate the health and safety impacts of the transload facility, and offered to file an "advisory" Site Plan Application with the Borough. The Borough refused to accept anything less than a formal application in which the Riverdale Planning Board would have full authority to disapprove or condition the operation of the transload facility.

4. Construction work on the transload facility was completed in early July 1996, and NYS&W began using it for corn syrup transloading operations. The Borough responded by filing a civil action against NYS&W in the Superior Court of New Jersey—*Borough of Riverdale v. New York Susquehanna and Western Railway Corporation*, Docket No. MRS-L-2297-96—seeking an injunction restraining further operation of the transload facility. The Borough's

request for injunctive relief came before the Superior Court for hearing on August 7, 1996. After reviewing the parties' briefs and evidence and hearing oral argument, the Court rendered an oral decision. A copy of the transcript of the Court's ruling is attached hereto as Exhibit 1. The Court held that the Borough's application of local zoning regulations was preempted by the ICCTA (Exh. 1, pp. 5-6) and that the Borough's regulation of health and safety and environmental concerns could not be used "as a device for getting rid of a facility that it really doesn't want" (*id.*, p. 9). The Court also concluded, however, that local health, safety, and environmental regulations (such as provisions dealing with electrical wiring standards and drainage issues) were not preempted by the ICCTA, provided that local authorities "do not abuse that regulation so as to deny the facility the right to operate" (*id.*, p. 19).

5. Consistent with this oral decision, the Court issued a written Judgment on August 21, 1996, confirming that "the defendant shall not be bound by Local Zoning regulations of Plaintiff as to Land Use & Utilization, as this constitutes economic regulation which is preempted by the [ICCTA]" (Exh. 2, ¶ F). Further, the Court held that NYS&W should file a site plan application with the Borough of Riverdale Planning Board (*id.*, ¶ A) and that the Borough "shall review said Application in its normal course, subject to its standards procedures, and should do so in a way which is not inappropriately obstructive to the operation of the facility" (*id.*, ¶ B). The Court also held that the Borough was barred from interfering with NYS&W's continued operation of the transload facility as long as it complied with the Judgment (*id.*, ¶ H). Thus, NYS&W continued to operate the facility during the Planning Review process.

6. NYS&W filed a site plan application with the Planning Board as required by the Court's judgment. The Board conducted a dozen hearings on the application between December 1996 and April 1998. Also, unbeknownst to NYS&W, the Borough on September 8, 1997, filed

a Petition for Declaratory Order with the STB seeking a determination that NYS&W's transload facility was not subject to the STB's jurisdiction and that the Borough's land use permitting and zoning regulations were not preempted by the ICCTA.

7. In order to finally bring the Planning Board proceedings to a close, NYS&W negotiated an agreement with the Planning Board that ultimately was incorporated in a Consent Order entered by the Court on July 22, 1998 (Exhibit 3). It provided, among other things, that NYS&W would continue to use the facility for transloading food grade products. If NYS&W wished to change the use of the facility, it was required to apply to the Borough of Riverdale Planning Board in accordance with the Court's Judgment (Exhibit 2). Exh. 3, ¶ 1. The Consent Order also placed a few agreed conditions on NYS&W's corn syrup transloading operations (*id.*, ¶¶ 2-4), provided for some fencing, curbing, and landscaping improvements (*id.*, ¶¶ 5-8), committed NYS&W to pay the Borough's expert fees (*id.*, ¶ 9), and committed NYS&W to obtain certain licenses and building permits with respect to the corn syrup operation (*id.*, ¶¶ 10-12). The Court retained jurisdiction over the case for purposes of enforcing the Consent Order and the Judgment it had previously entered (*id.*, ¶ 20).

8. Because NYS&W was unaware that the Borough had filed a Petition for Declaratory Order with the STB in September 1997, it did not inform the STB that the Consent Order had been entered, and neither did the Borough. On September 9, 1999, the STB issued a decision outlining its views regarding the ICCTA preemption issues raised by the Borough and seeking comments regarding some issues. *Borough of Riverdale—Pet. for Dec. Order—The New York, Susquehanna and Western Ry. Corp.*, 4 S.T.B. 380 (1999). With respect to the zoning issue, the STB held:

Given the broad language of section 10501(b) [of the ICCTA] and the recent court and agency decisions construing it, it is well

settled that, as the New Jersey state court determined, the Borough can not apply its local zoning ordinances to property used for NYSW's railroad operations. The Borough suggests in its petition that NYSW should have located its transloading facilities not in Riverdale but in a nearby industrial zone But as the court found, the zoning regulations that the Borough would impose clearly could be used to defeat NYSW's maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce. As the courts have found, this is the type of interference that Congress sought to avoid in enacting section 10501(b).

4 S.T.B. at 387. With respect to building permits, the Board suggested that localities could enforce in a nondiscriminatory fashion "electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities." *Id.* at 388-89. Other land use or public health and safety requirements could not be enforced if they would significantly interfere with NYS&W's operations. *Id.* at 388.

9. Although NYS&W and numerous other parties filed comments as requested by the STB, the STB subsequently terminated the proceeding on the ground that the Consent Order entered by the Court had resolved the dispute. *Borough of Riverdale—Pet. for Dec. Order—The New York, Susquehanna and Western Ry. Corp.*, STB Fin. Dkt. No. 33466 (served Feb. 27, 2001).

10. The NYS&W transload facility was used for a number of years to transload corn syrup, but the market for that transportation shifted away from NYS&W over time. Eventually, NYS&W began to look for other products that could efficiently be transloaded at the Riverdale facility. In 2009, NYS&W was approached by a brick supplier, Tri-State Brick, Inc., about the possibility of using the facility to transload bundles of custom-ordered bricks that would be transported to the transload facility in rail boxcars from fabrication plants around the country and transloaded to trucks for delivery to the New York/New Jersey area. As required by the Consent

Order (Exh. 3, ¶ 1), NYS&W on April 8, 2009, filed a site plan application with the Borough of Riverdale Planning Board for the brick transload operation, after consulting with the Planning Board's lawyer on both the procedure to be followed and the necessary contents of the site plan application.

11. The Planning Board held hearings on April 23, May 28, and June 25, 2009.

Transcripts of those hearings are attached to the Borough's Petition as Exhibit D. In summary,

- April 23: NYS&W presented its proposed changes, which consist primarily of removing some of the special water and electrical stanchions related to the old corn syrup operation, repairing some of the perimeter fencing, and constructing a loading ramp to enable forklifts to unload bundles of brick from boxcars. Borough Pet. Exh. D, 4/23/09 Tr., pp. 11-13. Some questions were raised about whether a municipal water pipe running across the facility under an easement would be affected by the load of brick on the pavement above, and NYS&W agreed to seek a determination from the water district authorities regarding that issue. *Id.*, p. 137.
- May 28: NYS&W presented a slightly revised site plan showing the limitation of the stored brick to approximately 9 feet in height and written proof of the acceptance of the plan by the North Jersey Water Commission. *Id.*, 5/28/09 Tr., p 7. (A copy of the revised site plan is attached hereto as Exhibit 4.) At the end of the hearing, NYS&W was given a list of issues to address. NYS&W addressed all issues in a letter provided to the Board on June 16, 2009. *Id.*, 6/25/09 Tr., p. 4. NYS&W also provided a follow-up letter from the Water Commission confirming its prior representation that the brick transload operation, as amended by NYS&W, would pose no safety issue regarding the municipal water pipe. *Id.*, p. 5.

- June 25: NYS&W appeared to address any further questions or issues regarding health and safety issues that the Planning Board might have. None was raised. *Id.*, 6/25/09 Tr., *passim*.

12. Although the Planning Board hearings covered a variety of topics, the principal focus was on the temporary storage of brick bundles at the transload facility pending their loading onto trucks for delivery to the customer. As witnesses for NYS&W and Tri-State Brick explained at the hearings, the bricks that would be handled at the facility are custom-ordered and, to insure consistency of color and dimension, they are typically fabricated in single lots sufficient to meet the estimated need for the entire project. *Id.*, 4/23/09 Tr., pp. 52-53. Due to timing issues and differences in the capacity of the different modes of transportation, some bricks will be stored temporarily at the NYS&W transload facility, so that they can be delivered to the customer at the project site as they are needed. *Id.*, 4/23/09 Tr., pp. 30-31. As NYS&W's witnesses explained, this same kind of temporary storage takes place in railroad intermodal yards and transload facilities for a wide variety of products (such as automobiles and lumber). *Id.* Temporary storage was also involved when corn syrup was transloaded at the yard. Rail tank cars hold considerably more corn syrup than can be carried in a single tank truck, and customers often could not take the entire quantity ordered at one time. Accordingly, carloads of corn syrup were often temporarily held for some time at the transload facility before the customer ordered in a truckload, and it was heated up for transfer to the truck and delivery to the customer. *Id.*, 5/28/09 Tr., p. 21.

13. The lawyer for the Planning Board advised the Planning Board at the hearings that in his view the receipt, storage, and handling of the bricks at the NYS&W yard was rail "transportation" covered by ICCTA preemption, just as the receipt, storage, and handling of corn

syrup had been. *Id.*, 4/23/09 Tr., pp. 73-74; 5/28/09 Tr., pp. 18-22. The Planning Board, however, chose to ignore the advice of its counsel. Instead, the Board chose to rely on the jurisdictional analysis of the Board's non-lawyer Planning Consultant. Exh. E, 6/25/09 Tr., pp. 6-8. In her view and the Board's view, the temporary storage of bricks in transit at NYS&W's transload facility was not part of rail "transportation" within the meaning of the ICCTA. As the Chairman of the Planning Board summarized:

[T]he board's position . . . all along throughout these hearings, is that – we understand the rights of the railroad to deliver their product by rail car. Once it's sitting in the yard, we believe we have jurisdiction over what goes on at the site. . . . Again, I understand the argument put forth by the railroad. But, again, once it's offloaded and sitting on that platform, I think it belongs to us.

Id., 6/25/09 Tr., pp. 8-9.

14. At the same time, the Chairman of the Planning Board made clear that the real impetus for the Board's position had little to do with the particular transloading process that was used at the NYS&W facility. The Board's real concern, as it had been when corn syrup was being transloaded, was the *location* of the facility. As the Chairman put it:

These lines extend right down into the industrial zone. . . . I can't understand why – well, I guess it's all about money. Why a proper offloading and transfer facility couldn't be constructed a quarter mile down the road, down the line, in the industrial zone Obviously, the railroad intends on using . . . this spur for either offloading corn syrup or bricks, or whatever it is in the future. And I think every time they change their mind on what use is going to go in there, we're going to be sitting here going through the same thing over and over again. And inconveniencing the people from Munn and the rest of the town.

Id., pp. 9-10. The Mayor of Riverdale, serving as a member of the Planning Board, expounded on the Chairman's position:

I would also like to recommend that the applicant, if time is of the essence to them, that they amend their application and put it in the industrial zone where such activity belongs, and they can prepare a

full site plan that I – our planner would determine whether that is a permitted use. But it would be far more appropriate down there, as you said, rather than the redevelopment/residential zones they are looking at putting it in.

Id., pp. 10-11.

15. At the hearing on July 25, the Planning Board terminated its consideration of NYS&W's site application and resolved to "protect our rights" by seeking confirmation from the STB that a brick transload operation at NYS&W's facility is not "transportation" subject to the STB's exclusive jurisdiction under the ICCTA. *Id.*, 6/25/09 Tr., pp. 11-13. In the Board's view, if NYS&W desired to conduct brick transload operations, it would have to find another site "in the industrial zone where such activity belongs" and file a new site plan application seeking authority from the Planning Board to construct and operate a transload facility there. *Id.*, pp. 10-11.

16. On August 6, 2009, NYS&W filed with the Superior Court in *Borough of Riverdale v. New York Susquehanna and Western Railway Corporation*, Docket No. MRS-L-2297-96, a motion for an order to show cause why an injunction should not issue permitting NYS&W to proceed with the use of its yard for transloading bricks. The Court issued an Order to Show Cause the same day (Exhibit 5), requiring the Borough to file its written response by August 31, NYS&W to reply by September 11, and the parties to appear for a hearing on the matter on September 16.

17. The Borough in its response argued that the Court's proceedings should be stayed because the Borough wanted to solicit the STB's advice regarding whether NYS&W's planned transload operation qualifies for preemption of local zoning and land use regulation under the ICCTA. In addition to its prior position that temporary storage of bricks was not part of

“transportation” within the meaning of Section 10501(b) of the ICCTA, the Borough asserted that the proposed transload operation was not a “railroad” operation.

18. At the hearing on September 16, the Court denied the Borough’s request that the Court’s proceedings be stayed pending an effort by the Borough to initiate a declaratory order proceeding at the STB. The Court determined that the Planning Board had erred in attempting to establish as a precondition of its consideration of NYS&W’s site application that ICCTA preemption applied to the facility. The Court held that since NYS&W had made out a *prima facie* case that ICCTA preemption applied, the Planning Board’s consideration of the site application was limited to health and safety issues. Exh. 6., pp. 59-60. The Court emphasized that the Planning Board could not use the review process to interfere with NYS&W’s operation. *Id.*, p. 72 (“[Y]ou . . . now have a decision from this Court that the Board cannot stop your facility. It’s only a question of reasonable health and safety issues.”) The Planning Board was given 45 days to complete its health and safety review. *Id.*¹

19. The Borough filed its Petition with the STB on September 21, 2009. That Petition makes exactly the same argument to the STB that the Borough made to the Court—that there is a

¹ The Court issued an Order on September 28, 2009 (Exhibit 7), summarizing the result of the hearing. It confirmed that storage in transit as part of a transloading operation constitutes “transportation” within the meaning of 49 U.S.C. § 10501(b), that NYS&W had made out a *prima facie* case that the transload operation it wished to conduct at its Riverdale facility constitutes transportation by rail carrier under Section 10501(b), and that the Planning Board had no authority to make a finding of federal preemption a precondition of its consideration of health and safety issues regarding NYS&W’s operation of its facility. Exh. 7, Finding ¶¶ 1-3. The Court also found that the Borough had the right to pursue jurisdiction questions at the STB if it wished (*id.*, Finding ¶ 4); however, the Court ordered that the Planning Board reinstate NYS&W’s application, and resolve any health and safety issues within 45 days (*id.*, Ordering ¶¶ 1-2), ordered that the Consent Decree remains in full force and effect (*id.*, ¶ 3), ordered that subject to resolution of the health and safety issues, “the operations of Defendant may commence at once” (*id.*, ¶ 4), and ordered that the Court would schedule a further hearing no later than November 9, 2009, if it appeared by notice of either party that any health and safety issues could not be resolved within 45 days (*id.*, ¶ 5).

question about whether NYS&W is in charge of the transload operation at its facility. Petition at 10-16. That Petition also seeks the same injunctive relief that the Borough sought from the Court—that NYS&W be prevented from using the facility for brick transload operations until after the STB has made its determination. *Id.* at 16-18.

ARGUMENT

The STB should deny both the Borough's petition for a declaratory order and the Borough's request for a stay. There is no legal or factual basis upon which a stay or other injunctive relief may be granted by the STB, the matter is already pending before a court that has not asked for the STB's assistance, and there is no uncertainty about the application of the law in this case that could justify the institution of a declaratory order proceeding.

I. THERE IS NO LEGAL OR FACTUAL BASIS UPON WHICH THE STB COULD GRANT A STAY OR OTHER INJUNCTIVE RELIEF

As a threshold matter, the Court has already rejected the Borough's request that NYS&W be enjoined from operating its Riverdale facility to transload bricks pending the STB's evaluation of the case. If the Borough does not like the Court's decision, its remedy is to appeal that decision within the New Jersey state court system. The Borough cannot collaterally attack the Court's decision by asking the STB to grant the very relief that the Court has denied.

In any event, the STB has no statutory authority to grant the injunctive relief sought by the Borough. The Borough cites 49 U.S.C. § 721(b)(4) and *DeBruce Grain, Inc. v. Union Pac. R.R.*, 2 S.T.B. 773 (1997), for the proposition that the STB can grant injunctive relief under the standards of *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Petition at 16-17. But *DeBruce Grain* concerned alleged violations by a railroad of a variety of provisions of the ICCTA. 2 S.T.B. at 775. The STB's statutory enforcement authority is limited to violations of the ICCTA. 49 U.S.C. § 11701, et seq. The Borough does not claim

that NYS&W has violated any provision of the ICCTA. The Borough's concern is that NYS&W's transload operations may violate local zoning and land use law. The STB cannot enforce local zoning and land use law or enjoin violations of such law. That is quintessentially a matter for the courts.

Finally, even if the STB had statutory authority to grant injunctive relief here, the Borough has failed to present grounds upon which a stay could be granted under the *Holiday Tours* standards. As noted by the Court, NYS&W has already made a prima facie case that the operations proposed at its Riverdale facility constitute "transportation" by "rail carrier" within the meaning of the ICCTA. For the reasons discussed below, there is little likelihood that the Borough can succeed in this case on the merits. There is also neither irreparable or substantial harm to the Borough or its residents, because any health and safety issues will be resolved by the parties or the Court before NYS&W begins operations. Moreover, the Borough's effort to define the public interest by reference to *some* of the public must fail. Congress determined in passing the ICCTA that the public interest of the nation is served by the free flow of interstate commerce—subject to reasonable, non-interfering health and safety conditions.

II. THERE IS NO JUSTIFICATION FOR THE STB TO INITIATE A DECLARATORY ORDER PROCEEDING IN THIS CASE

The STB has broad discretion under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to grant or deny requests that it initiate declaratory order proceedings. *See Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675; *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984). This is clearly not an appropriate case for the STB to exercise its discretion to institute such a proceeding. The Court has not sought the STB's assistance, the applicable legal standards are clear, and the Borough has raised no issues that could justify further proceedings.

A. The Superior Court Is Actively Handling The Case And Has Not Sought The STB's Assistance

Although the Superior Court has not foreclosed the Borough from seeking to initiate a declaratory order proceeding at the STB, the Court has not asked for the STB's assistance. Indeed, the Court has declined the Borough's request that the Court suspend its proceedings pending the STB's consideration of the Borough's effort to initiate a declaratory order proceeding. All that remains for NYS&W to begin operations is rapid resolution of any remaining health and safety issues regarding NYS&W's proposed operations.²

Ordinarily, the STB is reluctant to initiate a declaratory order proceeding in a case where there is active litigation before a court in which the ICCTA preemption issue has been squarely presented for the Court's decision. *See, e.g., Green Mountain R.R. Corp.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34052, slip op. at 4 (served May 28, 2002) (declining to institute a declaratory order proceeding where an active court case was ongoing and the court had declined to refer the ICCTA preemption issue to the STB). Here, the fact that the Court refused to stay its proceedings while the Borough sought to initiate a proceeding at the STB only underscores that the Court is not looking to the STB to provide any kind of guidance on the ICCTA preemption issue.³ As the STB emphasized with respect to this very facility, the most that the STB can do is

² The Borough has not asked the STB to consider any of those health and safety issues, and it would be inappropriate for the STB to do so, since the Court has clearly reserved for itself the resolution of such issues. Exh. 7, Ordering ¶ 5.

³ There is no doubt that courts can and do decide ICCTA preemption issues without the STB's involvement in the proceeding. *See, e.g., Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001); *City of Seattle v. Burlington Northern R.R. Co.*, 41 P.3d 1169 (Wash. 2002); *A&W Properties, Inc. v. Kansas City Southern Ry. Co.*, 200 S.W.3d 342 (Tex. App. 2006); *Rushing v. Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001); *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (D. Wisc. 2000); *Soo Line R.R. Co. v. City of Minneapolis*, 38

provide guidance regarding “how we believe [ICCTA preemption] issues might be analyzed by a court with appropriate jurisdiction.” 4 S.T.B. at 387. Given that the court has not suggested it wants or needs any guidance, the STB should not consume its or the parties’ resources in a parallel proceeding that duplicates the Court’s review.

B. The Applicable Legal Standards Are Clear

The first time the STB had occasion to consider ICCTA preemption in connection with NYS&W’s Riverdale facility, the applicable legal standards were in the early stages of being articulated by the courts and the STB. The STB stressed that “the record consists mainly of material from a state court proceeding decided in 1996, before many of the recent Board and court decisions addressing the reach of the ICCTA preemption provisions were issued.” *Id.* at 383.⁴ The Court’s 1996 Judgment was one of the first addressing ICCTA preemption in the context of transload facilities, and the STB believed that it could be of assistance in summarizing “recent relevant agency and court decisions concerning the reach of the express statutory preemption in section 10501(b)” and addressing “certain issues where the law has become well settled [between 1996 and 1998] as to how preemption applies.” *Id.* at 384.

F. Supp. 2d 1096 (D. Minn. 1998); *Burlington Northern S.F. Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997).

⁴ The STB also noted that the record did not reflect what had happened in Riverdale since the issuance of the Court’s September 1996 decision. *Id.* The reason the record did not reflect that, as discussed in the Background above, is that the Borough did not serve NYS&W (or alert the Court) when the Borough filed its petition for declaratory order with the STB. The Borough also failed to update the STB as the Court proceeding progressed. Thus, the STB did not know that a Consent Order had been entered in the case the previous year. After the STB was informed of the Consent Order, it terminated the proceeding on the ground that the case had been resolved. *See Borough of Riverdale—Pet. for Dec. Order—The New York, Susquehanna and Western Ry. Corp.*, STB Fin. Dkt. No. 33466 (served Feb. 27, 2001).

No such circumstance is presented today. Since 1996, the courts and the STB have considered a multitude of cases involving ICCTA preemption in a variety of contexts, and many of those cases have involved transload facilities. Among other things, the “temporary storage” issue that was the focus of the Planning Board’s reservations about ICCTA preemption during its hearings on April 23, May 28, and June 25, 2009, has been completely laid to rest:

Thus, under our statute, “transportation” is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and *temporary storage*. Accordingly, the courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For us to attempt to suggest otherwise here could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, *brick*, stone and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail component of the movement.

New England Transrail, LLC, D/B/A Wilmington & Woburn Terminal Ry.—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Fin. Dkt No. 34797, slip op. at 2 (served July 10, 2007) (emphasis added).⁵

Moreover, the question that belatedly became the focus of the Borough’s ostensible concern when it responded to NYS&W’s motion to show cause—i.e., that NYS&W might not be

⁵ Similarly, in *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), the court found that the following transloading activities all constituted “transportation” subject to ICCTA preemption:

(1) unloading bulk salt arriving by rail for local distribution by truck or for *temporary storage* in a shed pending distribution; (2) *temporary storage* and transport of “non-bulk goods, such as steel pipe[s]”; and (3) unloading bulk cement arriving by rail for *storage* in silos and eventual transport by truck.

Id. at 642 (emphasis added). See also *Joint Pet. for Dec. Order—Boston and Maine Corp. and Town of Ayer, MA*, STB Fin. Dkt. No. 33971, slip op. at 2 (served May 1, 2001) (“unloading, temporarily storing, and transferring [automobiles] to motor carriers for distribution in New England”) (emphasis added).

in control of operations at the facility—has also been thoroughly addressed in numerous decisions by the courts and by the STB. The Borough in its Petition underscores that the current Transloading Contract between NYS&W and Tri-State Brick (attached as Exhibit 8) provides that NYS&W “or its contract loader” will conduct the transloading operation. Petition at 2. But the courts and the STB have repeatedly held that a railroad may use a contractor to conduct a transload operation and still qualify for ICCTA preemption. *See, e.g., New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238, 249-50 (3rd Cir. 2007) (where railroad builds and owns and controls a transloading facility, it qualifies for ICCTA preemption even if the railroad employs a contract operator); *Canadian National Ry. Co. v. City of Rockwood*, 2005 WL 1349077, at *6-7 (E.D. Mich. 2005) (where railroad controls a transload facility, it qualified for ICCTA preemption even if the facility is constructed and operated by a contract operator); *City of Alexandria, Virginia—Pet. for Dec. Order*, STB Fin. Dkt. No. 35157, slip op. at 3 (served Feb. 17, 2009) (where railroad owns and controls a transload facility, it qualifies for ICCTA preemption even if the facility is operated by a contract operator for the railroad). The criteria by which courts and the STB assess a railroad’s control of operations at a facility are well-established and can readily be applied. *Id.*

C. The Borough Has Raised No Issues Justifying Further Proceedings

In an effort to create an issue in this case where none exists, the Borough cites several cases involving very different facts in which the courts or the STB held that ICCTA preemption did not apply—*Florida East Coast Railway Company v. City of West Palm Beach*, 231 F.3d 1324 (11th Cir. 2001); *Hi Tech Trans., LLC v. State of New Jersey*, 382 F.3d 295 (3rd Cir. 2004); *Tri-State Brick and Stone of New York, Inc. and Tri-State Transp. Inc.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34824 (served Aug. 11, 2006). Petition at 12-15. None is remotely on point.

All are examples of cases where a third-party business in a rail yard operated independently of the railroad owning or serving the rail yard. Indeed, in *Tri-State Brick*, the railroad serving the rail yard did not even own the rail yard. Tri-State Brick there leased facilities from the non-carrier owner of the rail yard, and there was no agreement between Tri-State Brick and the railroad for the provision of transloading service. Slip op. at 4-5. The circumstances are completely different here—where NYS&W built and owns the transload facility as part of NYS&W's rail system, does not lease the facility to another, does not allow any operations at the facility that are not under direct railroad control and directly related to railroad transportation, has an agreement with Tri-State Brick to provide transload services, is paid for those services by Tri-State as part of NYS&W's interstate rail service, and is responsible for the operations in the facility.⁶

In the end, the Borough is reduced to complaining that the current Transloading Agreement between NYS&W and Tri-State Brick is different from the transloading agreement that NYS&W originally presented to the Planning Board. Although the original agreement between NYS&W and Tri-State Brick was identical in all relevant respects to NYS&W's

⁶ The Borough suggests hypothetically in a footnote that a railroad could use a "third party's straw man entity" as a contract operator and so qualify for preemption without actually having control of the transloading operation. Petition at 16 n.2. The short answer to this, as NYS&W observed in its filings with the Court and at the September 16 hearing, is that NYS&W intends to use its wholly-owned subsidiary and agent, Susquehanna Bulk Systems, Inc., to conduct the brick transload operation at the Riverdale facility. Susquehanna Bulk Systems is no "straw man" for Tri-State Brick. Susquehanna Bulk Systems currently operates railroad transload facilities for NYS&W in Sparta, New Jersey, and North Bergen, New Jersey. Moreover, the Transloading Agreement itself does not permit any kind of "straw man" relationship. Under Section 7 of the Agreement, "NYS&W (including Loader)" must remain "an independent contractor with respect to Tri-State." Further, "[t]his independent contractor relationship is paramount to this Agreement, and nothing herein shall be construed as inconsistent therewith." Exh. 8, p. 4. Thus, the operations of NYS&W and its agent Susquehanna Bulk Systems must remain independent of Tri-State Brick.

agreement with Bulkmatic that governed the prior corn syrup operation, it became apparent to NYS&W during the hearings before the Planning Board that the Planning Board had some concern about the relationship between the parties. In order to eliminate any possible question of which entity would operate and be in charge of the facility, NYS&W and Tri-State Brick entered into a new Transloading Agreement effective July 31, 2009 (Exhibit 8). That contract specifically provides that NYS&W or its contractor (“Loader”) will operate the Riverdale facility and conduct the transloading and temporary storage. Exh. 8, ¶ 1.2. The Borough claimed before the Court that by entering into the Transloading Agreement NYS&W was seeking to “exploit a loophole” and engage in “gamesmanship” by making crystal clear that it will be in charge of the facility, but it was the Planning Board that sought that clarification. The Borough can hardly complain now that NYS&W was responsive to the Planning Board’s concerns.⁷

The Borough devotes several pages in its Petition to discussing the STB’s decision in *Hi Tech Trans, LLC—Pet. For Dec. Order*, STB Fin. Dkt. No. 34192 (served Aug. 14, 2003), and the Third Circuit’s *Hi Tech* and *Jackson* decisions, concerning the relationship between the railroads and the loaders in those cases. Petition at 13-15. But the Borough’s discussion of those cases serves only to underscore the strength of NYS&W’s position that ICCTA preemption clearly applies in this case.

In the STB’s *Hi Tech* case, the issue was whether the independent third-party shipper in that case qualified as a rail carrier by virtue of a trucking and transloading operation for which the railroad serving the facility disclaimed any responsibility. The STB held that the shipper was not a licensed rail carrier and that since the transload operations were not conducted “by a rail

⁷ The Borough’s suggestion that the July 31 Transloading Agreement does not “clearly abrogate or modify the March 8 agreement” is completely unfounded. Petition at 9. The July 31 Agreement provides that it “contains the entire agreement of the parties relating to NYS&W transloading of bulk materials between railcars and trucks at the Property.” Exh. 7, ¶ 20.

carrier or under the auspices of a rail carrier holding itself out to provide those services,” ICCTA preemption did not apply to those operations. Slip op. at 5. The Borough underscores language in a footnote in the case for the unexceptional proposition that there are formal procedures that must be followed to become a licensed rail carrier, and that the STB will not approve rail carrier authority that is a sham. Petition at 13. But the Borough nowhere explains what that has to do with this case. NYS&W *is* a licensed rail carrier and it will be responsible for the brick transloading operation at its Riverdale facility. The loader will not be Tri-State Brick, but either NYS&W itself or NYS&W’s wholly-owned subsidiary and agent, Susquehanna Bulk Systems. Since Susquehanna Bulk Systems will clearly be operating “under the auspices of a rail carrier,” there is no question here that the transloading operation at NYS&W’s Riverdale facility is a railroad operation.

The Third Circuit’s *Hi Tech* decision, which involved exactly the same facts as the STB’s *Hi Tech* case, is irrelevant for the same reason. The Borough cites a footnote in that case for the proposition that a party cannot make itself a rail carrier by contract. Petition at 14. But no one is claiming here that the contract between NYS&W and Tri-State Brick makes Tri-State Brick a carrier. On the contrary, the agreement between NYS&W and Tri-State Brick makes clear that NYS&W is responsible for the transloading and temporary storage operations at its Riverdale facility. The transloading operations could not be more “integrally related” to NYS&W’s rail operations.⁸

⁸ By the same token, the Borough’s discussion of the Eleventh Circuit’s *Florida East Coast* decision only serves to highlight the crucial differences between this case and that one. Petition at 12. NYS&W has not leased its facility to Tri-State Brick to set up an aggregate plant with which the railroad has no involvement, including in the loading or unloading of aggregate by a loader hired and controlled by the aggregate plant owner. 266 F.3d 1324, 1327. On the contrary, NYS&W owns and controls its Riverdale facility and has specifically provided by contract that

The Borough's citation of the Third Circuit's decision in *Jackson* likewise provides no support for its position. That decision stands for the proposition that where, unlike in *Hi Tech*, the rail carrier owns and builds the transload facility, the shipper pays the rail carrier for the loading operation, and the rail carrier does not disclaim responsibility for the loading process, it qualifies as transportation by rail carrier for purposes of 49 U.S.C. § 10501(b). 500 F.3d at 249. That is precisely the situation here. Apparently, the only reason the Borough cites *Jackson* is so that it can pull out of context a sentence in which the court explained that the point of its footnote in *Hi Tech* about making a shipper a rail carrier by contract was simply that "railroads and loaders may not change by contract what in practice is a substantively different relationship." Petition at 15 (citing 500 F.3d at 250). Even out of context, that statement is no help to the Borough, because there is no "practice" between NYS&W and Tri-State Brick at the Riverdale facility. The only relationship they have there is contractual.⁹ The Borough cannot claim that the March 2009 contract defines that relationship when it has been completely superseded by the July 2009 contract. It is frankly incredible that the Borough—after the Planning Board sought clarification of the relationship between NYS&W and Tri-State—should complain that the clarification it got is not to its liking. The Planning Board wanted assurance that NYS&W would be in control of its facility, and that is what it got in the form of the July contract. NYS&W and Tri-State Brick are bound by that contract. There is not a shred of support for the Borough's suggestion that they have some other "secret" relationship.

It bears emphasizing that the Borough made the same arguments to the Superior Court about NYS&W's control of its transloading operations that the Borough is now making to the NYS&W itself, acting directly or through its agent, will be responsible for the transloading operation.

⁹ As the Third Circuit pointed out in *Jackson*, the whole point of a contract is "to define the parties' relationship." 500 F.3d at 250.

STB, and the Court found that NYS&W had made out a prima facie case that the planned operation constituted transportation by rail carrier within the meaning of 49 U.S.C. § 10501(b). Exh. 7, Finding ¶ 2. Although the Court did not foreclose the Borough from seeking the STB's views on the subject, the Court did not refer any question to the STB or grant the Borough's request to hold the Court's proceedings in abeyance pending the STB's proceedings. As soon as any remaining health and safety issues are resolved, NYS&W's operations "may commence at once." *Id.*, Ordering ¶ 4.

Further, there are no factual or legal questions that could benefit from further pleadings. The STB has all of the information it needs to decide that the institution of a declaratory order proceeding is not justified. *See, e.g., Hi Tech*, slip op. at 5 (refusing to institute a declaratory order proceeding where the resolution of the ICCTA preemption issue was clear); *Union Pac. R.R. Co.—Pet. for Dec. Order*, STB Fin. Dkt. No. 34090, slip op. at 3 (served Nov. 9, 2001) (no need for declaratory order proceeding when issues presented are well settled).

CONCLUSION

For the foregoing reasons, the Board should deny the Borough's Petition for Declaratory Order and Stay.

Respectfully submitted,



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October 7, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2009, I served a copy of "Reply of The New York, Susquehanna and Western Railway Corporation to Petition of Borough of Riverdale for Declaratory Order and Stay" by overnight mail on:

James T. Bryce
Johnson, Murphy, Hubner, McKeon,
Wubbenhorst, Bucco & Appelt, P.C.
51 Route 23 South
P.O. Box 70
Riverdale, New Jersey 07457



Robert M. Jenkins III

EXHIBIT 1

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MORRIS COUNTY
DOCKET NO. L-2297-96
APP. DIV. NO.

BOROUGH OF RIVERDALE,

Plaintiff,

vs.

THE NEW YORK SUSQUEHANNA &
WESTERN RAILWAY CORPORATION,

Defendants.

TRANSCRIPT

OF

EXCERPT OF MOTION
(COURT DECISION)

Date: August 7, 1996

Place: Morris County Courthouse
Morristown, New Jersey

B E F O R E:

HONORABLE REGINALD STANTON, A.J.S.C.

TRANSCRIPT ORDERED BY:

WATSON, STEVENS, FIORILLA & RUTTER

A P P E A R A N C E S:

BARBARULA & ASSOCIATES,
BY: JOHN BARBARULA, ESQ.,
Attorney for the Plaintiff.

WATSON, STEVENS, FIORILLA & RUTTER,
BY: JOHN FIORILLA, ESQ.,
Attorney for the Defendant.

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I N D E X
EXCERPT OF 8/7/96

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COURT DECISION

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1 (Excerpt of motion of 8/7/96)

2 THE COURT: We're dealing here with actions taken in
3 recent months by the defendant, New York Susquehanna & Western
4 Railroad, to construct and operate a facility for offloading
5 liquid food product from tanker cars that are part of its rail
6 trains on to motor vehicle trucks, which will then take the
7 food product to various customers of the railroad.

8 The facility that has been constructed is located
9 along the right-of-way of the railroad, between Hamburg
10 Turnpike on the north and Post Road on the south. The right-
11 of-way of the railroad, in general appears to be 100 feet wide
12 throughout that section. The main track of the railroad is a
13 single track, so you can -- there is considerable area on the
14 sides of the track that is available for doing things such as
15 putting in scales for weighing of product and loading them into
16 trucks and providing some area for trucks to wait while they
17 are offloading product.

18 There has been extensive paving, fencing, and
19 lighting. There have been drainage and plumbing and electric
20 facilities that have been installed, because part of the
21 process requires that the product on the tankcars of the
22 railroad has to be heated so that it can be liquified to an
23 appropriate point where it can be readily pumped out into the
24 trucks.

25 This railroad was formerly subject to the

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1 jurisdiction of the Interstate Commerce Commission by federal
2 regulation which has -- federal statutory regulation which has
3 become effective in 1996. The Interstate Commerce Commission's
4 jurisdiction has been abolished over the railroad, and I
5 believe the entire Interstate Commerce Commission has been
6 abolished; but in any event, its function with respect to
7 railroads has been abolished. And, in general, the federal
8 government has considerably decreased the amount of economic
9 regulation to which railroads are being subjected. To the
10 extent that they continue to be economically regulated, the
11 federal government has given exclusive jurisdiction over the
12 economic regulation of railroads to the Surface Transportation
13 Board, which is a newly created agency of the federal
14 government.

15 As I look at 49 USCA, Section 10101 and Section
16 10501, it appears clear to me that the economic regulation of
17 this defendant railroad, as is the economic regulation of all
18 railroads in the country, is now subject to the exclusive
19 jurisdiction of the National Surface Transportation Board.
20 There is one exception to that which is not pertinent, and that
21 is railroads operated by local governmental entities for mass
22 transit are not subject to the board, in general, but with that
23 exception, which is not relevant here, all railroads are
24 exclusively regulated by the board.

25 It is also clear, both from the terms of the statute

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1 and from recent state court decisions in Georgia and Nebraska,
2 which are persuasive, that the intent of Congress was to
3 preempt all state regulation, economic regulation of railroads.
4 However, Congress has not preempted the authority of state and
5 local governments with respect to matters of health and safety
6 and environmental concern. Congress theoretically could do
7 that, but it virtually never does in any area of economic
8 regulation in which it acts because of the obvious lack of
9 utility in doing that. So there is virtually always, and there
10 is with respect to this particular regulatory scheme that is in
11 front of us now, a substantial area of state and local
12 government concern dealing with safety, health, environmental
13 protection, which is not preempted by the federal government
14 but which is left to the state.

15 There are many cases which deal in various areas of
16 regulation with the interplay between state and federal
17 regulation. Some that the parties have cited are Hines v.
18 Davidowitz, 312 U.S. 52, cited by the United States Supreme
19 Court in 1941, Florida Line and Avocado Growers Inc. v. Paul,
20 373 U.S. 81, as cited by the United States Supreme Court in
21 1963. There are legions of cases which indicate that, in
22 general, the preemption by Congress of important areas of
23 interstate commerce does not preclude simultaneous regulation
24 of safety and health and environmental concerns by state and
25 local government.

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1 Applying this general conceptualization to what has
2 occurred here, it seems clear to me that only the National
3 Surface Transportation Board has the right to determine whether
4 a facility like this may be operated by the railroad at this
5 site. I'm not sure whether they have a permitting process that
6 should have been invoked and wasn't. I do not know what their
7 permitting process is, if any. It's conceivable that they
8 don't have a permitting process, and that they have a laissez
9 faire attitude with respect to this. That may or may not be
10 good social and legal policy, but the reality is that the
11 federal government is dismantling substantial areas of economic
12 regulation.

13 In any event, to the extent that -- in any event, it
14 is the exclusive prerogative of the federal government and of
15 the National Surface Transportation Board to decide the basic
16 proposition of whether this facility can be operated at this
17 site as part of the operations of the railroad.

18 Accordingly, the Borough of Riverdale may not, by
19 direct action or by coming into state court, preclude the
20 defendant railroad from operating this facility at this site,
21 and the fact that this facility is not authorized by local
22 zoning regulations is legally immaterial in the local zoning
23 regulations. In terms of permitting of uses and in terms of
24 dimensional requirements, would amount to economic regulation
25 of the railroad, and that area of power is preempted -- has

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1 been preempted by Congress.

2 However, the municipality and other agencies of state
3 and local government do have the right to regulate aspects of
4 this facility which have to do with things such as drainage,
5 safety, and they have the right to do that with legitimate
6 vigor, provided that they do not abuse that regulation so as to
7 deny the facility the right to operate. In other words,
8 there's a difference between legitimate regulation that is
9 actually designed to make sure that if the facility is there
10 it's going to be safe in terms of having electrical equipment
11 that's not going to electrocute somebody or start a fire, in
12 terms of having paving and physical improvements that do not
13 create drainage difficulties for adjacent property or the
14 public roadways, and there may also be regulation by state and
15 local governments of such things as the emission of diesel
16 fumes from the trucks which are operating at the facility.

17 We had a brief clip of some diesel trucks picking up
18 product. It's interesting to note that the driver never turned
19 his motor off. Of course, we couldn't tell too much from that
20 because we only watched it for three minutes, but diesel truck
21 drivers will stop for two or three hours and never turn their
22 motor off because they think it hurts their engines and they
23 will meanwhile pump poisonous fumes into the environment with
24 reckless abandon. It seems to be something that goes with
25 being a diesel truck driver, that one has the mindset that he

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1 should never turn his engine off. They actually even go into a
2 motel and let them run all night while they sleep, sometimes.
3 We're not going to have that here because there are no motels
4 nearby, but the point I make, somewhat humorously, is that it
5 would be a legitimate area of concern to do that, to have
6 reasonable regulations to make sure that things like unending -
7 - you know, running of diesel engines while trucks are just
8 idling. So that type of thing may be regulated because it
9 impacts on the quality of life of local residents, and that
10 kind of regulation does not interfere with the economic
11 functioning of the facility.

12 So it seems clear to me that if we speak of specific
13 regulations, that the municipality is entitled to insist upon
14 site plan approval for this facility. That means that the
15 mechanical details of how the facility works have to be
16 submitted to the planning board, so that the board and its
17 professional staff or its retained professionals can review
18 things like drainage, so that they can -- the board can make
19 sure that soil erosion concerns which are the direct concern of
20 the Soil Conservation Commission are met, so that code
21 requirements with respect to plumbing and electrical services
22 are met, and so that whatever local regulations are with
23 respect to fencing designed to protect people from trespassing
24 on the property and becoming injured, that sort of thing, that
25 those things can -- and although it would probably be the

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1 planning board to do it, other agencies of local government or
2 state government can do things, have reasonable regulation of
3 the emissions, of the operation of the truck engines by trucks
4 that are waiting to pick up product.

5 So, in general, site plan approval is required and
6 comparable local regulations which is designed to check safety
7 and health and environmental concerns may be applied.

8 Now, normally, I would vindicate the authority of the
9 local governing body to have site plan approval mechanisms
10 followed by closing this operation until such time as it
11 obtained site plan approval. In other words, if we had someone
12 who was clearly subject to site plan regulation and they simply
13 didn't ask for it but had the gaul to go and create a facility
14 in derogation of the regulating goals of the local government,
15 to vindicate the integrity of the permitting scheme by closing
16 the facility until a permit had been secured. Considering,
17 however, that we're dealing here with an unusual
18 interrelationship between a specially regulated entity of
19 interstate commerce and local government, I will not -- I do
20 not think we have -- we are dealing with just naked trampling
21 on the permitting scheme of the local government. I think the
22 violation of the regulatory scheme was inadvertent because the
23 defendant did not realize it was subject to the local
24 regulatory scheme.

25 Under those circumstances, I will permit the facility

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1 to continue in operation while the site plan approval is
2 sought. I will direct that within 30 days the defendant shall
3 submit an application for site plan approval, and the board
4 shall then process the application, and it shall do it in a way
5 which is not inappropriately obstructive of the operation of
6 the facility, but is legitimately intended to further local
7 concerns with respect to the environment and safety elements.

8 I will assume that the process will go forward and
9 that it will be completed no later than January 31st of 1997.
10 I anticipate that it should be done long before that, but if it
11 has not been completed by then, then I want the matter to come
12 back before me so that I can see what is going on.

13 I want to make sure that we don't have two things --
14 one of two things happen. I do not want the defendant to say,
15 we don't really have to do this and so we're going to do it in
16 a begrudging, withholding fashion, not disclosing, not being
17 forthcoming with plans and details and specifications. I do
18 not want that to happen; and if it does, I will then think of
19 doing such things as shutting the facility until there is
20 approval. But I trust that that will not happen.

21 I also do not want the local governing body to use
22 the regulatory mechanism with respect to the safety and
23 environmental and health concerns as a device for getting rid
24 of a facility that it really doesn't want. So if that occurs,
25 then I'm going to have to deal with that. If somebody thinks

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1 that's happening, they could reapply for relief, but I
2 anticipate that it will not happen, and people think about it,
3 and go forward about their legitimate business and about their
4 legitimate regulations.

5 So I will, however, say that if the process is not
6 completed by January 31st, 1997, that I will have parties back
7 in court. And I also want to be informed if, prior to that
8 date, the process has been completed and site plan approval has
9 been sought, I want the plaintiff to notify me.

10 Mr. Barbarula.

11 MR. BARBARULA: Yes, Your Honor. There's been a
12 representation by counsel for the defendant that they have
13 ceased construction from Post Lane to Riverdale Road. I'd like
14 the Court, since there hasn't been any creation and the
15 commitment of assets to that, to restrict that further
16 development.

17 THE COURT: Thank you for reminding me. I don't
18 think there should be any further construction until there's
19 site plan approval. There's one thing that should perhaps be
20 done in an ad hoc kind of emergency basis, and that is, there
21 may be drainage problems that surface on a day-to-day basis,
22 that emerge on a day-to-day basis, and if water is running
23 along and getting into somebody's backyard. I note that there
24 are along one side of this, there are a lot of residences, and
25 some of them have been flooded. We've seen that on the

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1 videotape which the plaintiffs submitted. Whether that was due
2 to Hurricane Bertha or to this facility or whether it was a
3 combination of this facility and Hurricane Bertha, I'm not
4 sure. But one can envision, there's been a tremendous amount
5 of paving here. Whenever you start paving, you do create
6 drainage problems. No doubt about it. You change the way the
7 water is flowing, you reduce substantially absorption into the
8 ground, and you change the course of it, and so you have to do
9 something about it. And it is not uncommon that people
10 designing a drainage system, and they have a lot of faith and
11 they have a system they think works, and they actually start
12 work and actually start operating, they found out that it
13 doesn't work perfectly and so they have to retool it.

14 Now the Borough -- the defendant should incorporate
15 its existing drainage design in its submission for site plan
16 approval, and if makes modifications, it should incorporate
17 those. There really shouldn't be any new construction, but if
18 somebody notices flooding and they want to readjust the piping
19 on an emergency basis to stop a flooding problem, that kind of
20 construction can go on. The Borough officials should be
21 informed of it contemporaneously, but we don't want to get into
22 some mindset where everybody sits there and watches some poor
23 soul's backyard washed away because they don't want to allow
24 hands-on corrective work to take place.

25 So the order should say there's not to be any new

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1 construction until the permit, but the existing facility can be
2 operated and drainage amelioration can be accomplished on a
3 consulting basis with the Borough engineer or other appropriate
4 officials.

5 Okay. Would you draft a form of judgment? I'm going
6 to call it judgment. I don't think we need a have a trial on
7 this. The conceptualization is clear, it seems to me, and I'm
8 going to rely on the planning board and the defendant to work
9 out the actual resolution of the problem, and I don't
10 anticipate that they'll be any further proceedings before me
11 and I will treat this present order that I'm going to sign in a
12 few days that Mr. Barbarula will submit to me, I will treat
13 that as a judgment disposing of the matter, but I will allow
14 people to reapply if there are ongoing problems.

15 MR. BARBARULA: Thank you, Your Honor.

16 MR. FIORILLA: Your Honor, can we get a transcript to
17 help us prepare that order? I think that might be --

18 THE COURT: Well, you can get a transcript or you can
19 get a -- it's going to take you a while to do that. You can
20 get right now a copy of the videotape. Buy a videotape for
21 \$10.

22 MR. FIORILLA: Okay.

23 MR. BARBARULA: Buy a videotape. The day of modern
24 technology.

25 THE COURT: You can see the clerk about it.

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1 MR. FIORILLA: Thank you, Your Honor.

2 THE COURT: Okay. I'm going to be off the bench for
3 a few minutes.

4 (Proceedings concluded)

5 I, MICHELE VICARO, the assigned transcriber, do
6 hereby certify that the foregoing transcript of proceedings in
7 the Morris County Superior Court on August 7, 1996, Videotape,
8 as indexed by the Court, is prepared in full compliance with
9 the current Transcript Format for Judicial Proceedings and is a
10 true and accurate record of the proceedings.

11
12 Date:

8/16/96

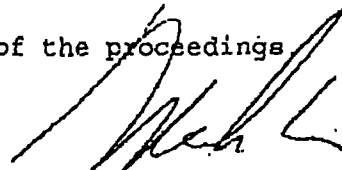

Michele Vicaro, AD/T 352
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EXHIBIT 2

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JUDGE REGINALD STANTON

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FILED

AUG 21 1996

Reginald Stanton, A.J.S.C.

BARBARULA AND ASSOCIATES
23 Professional Building
1242 Route 23 North
Butler, New Jersey 07405
(201) 492-1190
Attorneys for Plaintiff

BOROUGH OF RIVERDALE,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
	:	MORRIS COUNTY
Plaintiff,	:	
	:	Docket No: MRS-L-2297-96
vs.	:	
	:	<u>CIVIL ACTION</u>
NEW YORK SUSQUEHANNA &	:	
WESTERN RAILROAD,	:	
	:	JUDGMENT
Defendants,	:	

THIS MATTER coming before the Court by way of Order to Show Cause with Restraints, Plaintiff, Borough of Riverdale, being represented by Barbarula and Associates, John M. Barbarula, Esq. appearing, and the Defendant, New York Susquehanna & Western Railroad, being represented by Watson, Stevens, Fiorilla & Rutter, John K. Fiorilla, Esq. appearing; and the Court having reviewed the pleadings, video tapes and briefs of all parties; does hereby adjudge as follows:

A. Defendant, New York Susquehanna & Western Railroad, shall file a Site Plan Application with the Borough of Riverdale Planning Board by September 8, 1996;

B. Plaintiff, Borough of Riverdale, shall review said Application in its normal course, subject to its standard procedures and shall do so in a way which

is not unreasonably obstructive to the operation of the facility.

CH, JSC

- C. In the event that the Application has not received final approval by January 31, 1997, the parties are to notify the Court and the Court will set a hearing date for further proceedings;
- D. The Defendant is estopped from further construction, other than emergent repairs such as to correct drainage defects. The Defendant shall notify the Borough when it must make such emergent repairs;
- E. The Defendant shall comply with all applicable safety and health and welfare regulations;
- F. The Defendant shall not be bound by Local Zoning regulations of Plaintiff as to Land Use & Utilization, as this constitutes economic regulation which is pre-empted by the ICC Termination Act of 1995; and
- G. The portion of the Amended Complaint disputing the Defendant's right to cross Post Lane is hereby severed and by this Judgment is transferred to Chancery Division for disposition. All other issues are resolved by this Judgment.
- H. The Plaintiff will not preclude or interfere with Defendant's option of the facility as long as it is in compliance with this Judgment.

By, 0730
The Court is hereby giving Judgment by the Court for the parties.
ENTERED as a Judgment upon the Court records pursuant to Rule

4:42-1 et seq. as a Final Judgment. *8th day of August 21, 1996.*

REGINALD STANTON
JUDGE OF THE SUPERIOR COURT
ASSIGNMENT JUDGE

Reginald Stanton
Hon. Reginald Stanton

ASSIGNMENT JUDGE

- TOTAL P.03

EXHIBIT 3

BARBARULA AND ASSOCIATES
23 Professional Building
1242 Route 23 North
Butler, New Jersey 07405
(973) 492-1190
Attorneys for Plaintiff

THIS PLEADING CLOSES THE CASE
FILED
JUL 22 1998

Reginald Stanton, A.J.S.C.

BOROUGH OF RIVERDALE,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
	:	MORRIS COUNTY
	:	
Plaintiff,	:	Docket No: MRS-L-2297-96
	:	
vs.	:	<u>CIVIL ACTION</u>
	:	
NEW YORK SUSQUEHANNA and	:	CONSENT ORDER
WESTERN RAILROAD CORP.,	:	
	:	
Defendant.	:	

THIS MATTER having come to the attention of the Court by John M. Barbarula, Esq., attorney for the plaintiff, BOROUGH OF RIVERDALE, and John K. Fiorilla, Esq., attorney for the defendant, NEW YORK SUSQUEHANNA and WESTERN RAILROAD CORP.; and it appearing that the parties have stipulated and agreed to the following terms and conditions; and the Court having considered same; and for good cause shown;

IT IS, on this 22 day of July, 1998;

ORDERED THAT:

1. The site shall be restricted for use by the Railroad, its successors, assigns, and their derivative users thereof to food grade products only. Railroad agrees not to transport to the premises or load or unload livestock at the facility. If the Railroad wishes to change the use of the premises, the Railroad shall apply to the Borough of Riverdale Planning Board in accordance with the Order of the Hon. Reginald Stanton,

A.J.S.C. entered and filed on August 21, 1996. The Railroad shall comply with all applicable local, state and federal laws in its operation of the facility. The aforesaid stipulations run with the land and are binding upon the current and future owners of the rail line.

2. All transloading must be accomplished by air method rather than diesel or mechanical methods, unless in the event of an emergency. Any spills that result during transloading must be reported to the Borough of Riverdale Board of Health, County of Morris and State of New Jersey as required. Railroad shall report all spills in excess of twenty-five (25) gallons to the Borough of Riverdale Board of Health.

3. Railroad shall place the compressor and heating unit in the box car to duplicate the equipment of the prior red box car and sound attenuating insulation in the box cars in order to hamper the noise. Insulation shall be performed immediately and all future date box cars shall be insulated to ensure compliance with the noise level maintained at present.

4. Railroad consents to an annual inspection of the boxcar by Borough officials. Each new box car plant installed shall be inspected upon installation by the appropriate Borough official prior to operation.

5. Railroad shall construct a twelve (12) foot high treated wood fence on a two (2) foot high berm. The fence shall extend approximately 550 feet along one side of the site as shown on the amended site plan from the northern right of way of Arlington to the southernly line of the Marra property (Block

24, Lot 3). The fence shall be composed of a minimum of three 1 inch by 6 inch horizontal rails.

6. Railroad shall complete installation of the curbing on the property as shown on the site plan.

7. Railroad shall continue to monitor the lighting with GPU to maintain current conditions.

8. Railroad shall plant and maintain approximately 25 white pine trees approximately 5 to 6 feet high along the west side of the site at Railroad's expense as per the Board Engineer's directives. All landscaping shall be reviewed in 24 months following the date of approval for the Board to determine whether the amount and condition of said landscaping is adequate. In the event that a deficiency is found, the landscaping shall be remedied and supplemented as agreed by the parties.

9. Railroad shall pay all outstanding professional fees within ten days of the execution of this Agreement or as soon as the amounts due are determined.

10. Railroad shall make any necessary application to the Department of Environmental Protection for boiler or boilers that Railroad wishes to install in the box car that require licensure.

11. Railroad shall grant a license or easement to the Borough of Riverdale Fire Department to use the Railroad's right of way currently in use in a form acceptable to the Railroad Corporate Law Department.

12. Railroad shall obtain all building permits to

accomplish the above.

13. Railroad shall submit an as built plan for review by the Board Engineer within 30 days after the completion of all work.

14. Borough accepts Railroad's traffic report for the purposes of settlement. Traffic report shall be incorporated as part of the record.

15. This Agreement shall be offered in evidence in any proceeding instituted by either of the parties in any court of competent jurisdiction, and shall, subject to the approval of the court, be incorporated in any judgment rendered in that action.

16. Should any provision of this Agreement be held invalid or unenforceable by an court of competent jurisdiction, all other provision shall, nonetheless, continue in full force and effect, to the extent that the remaining provisions are fair, just, and equitable.

17. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed by the party to be charged. The failure of either party to insist upon strict performance of any of the provisions of this Agreement shall not be deemed a waiver of any subsequent breach or default of any provision contained in this Agreement.

18. The laws of the State of New Jersey and of the United States (where preemption is found) shall govern the execution and enforcement of the within Agreement.

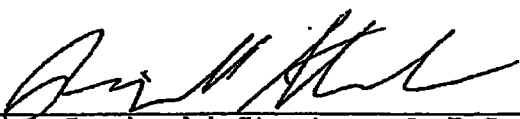
19. This Agreement shall be recorded by the Borough of Riverdale Planning Board in the Morris County Clerk's Office with indexing to the appropriate rights of way.

20. The above captioned action is dismissed with prejudice except for the purpose of enforcing this Stipulation and the Order entered and filed by the Hon. Reginald Stanton, A.J.S.C. on August 21, 1996.

REGINALD STANTON

JUDGE OF THE SUPERIOR COURT

ASSIGNMENT JUDGE


Hon. Reginald Stanton, A.J.S.C.

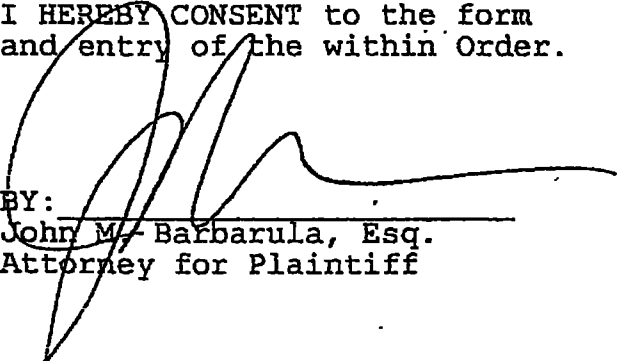
REGINALD STANTON

JUDGE OF THE SUPERIOR COURT

ASSIGNMENT JUDGE

I HEREBY CONSENT to the form
and entry of the within Order.

BY:


John M. Barbarula, Esq.
Attorney for Plaintiff

BY:

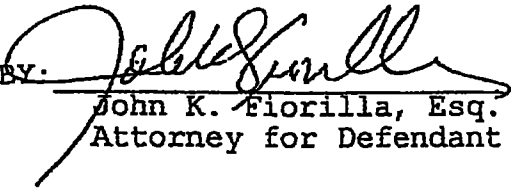

John K. Florilla, Esq.
Attorney for Defendant

EXHIBIT 4

EXHIBIT 5

FILED

AUG 06 2009

B. THEODORE BOZONELIS, A.J.S.C.
JUDGE'S CHAMBERS
MORRIS COUNTY COURTHOUSE

PREPARED BY THE COURT

BOROUGH OF RIVERDALE

Plaintiff

vs.

THE NEW YORK,
SUSQUEHANNA AND
WESTERN RAILWAY
CORPORATION,

Defendant

) SUPERIOR COURT OF NEW JERSEY
) LAW DIVISION : MORRIS COUNTY

) DOCKET NO. MRS-L-2297-96

) ORDER TO SHOW CAUSE
) SEEKING ENFORCEMENT
) OF LITIGANTS RIGHTS

This matter having been opened to the Court by John K. Fiorilla, Esq., of Capehart & Scatchard, P.A., attorneys for defendant, The New York, Susequehanna and Western Railway Corporation ("NYSW"), and it appearing to the Court from the Memorandum of Points and Authorities and exhibits attached thereto that good cause is shown,

IT IS ON THIS 6th day of AUGUST, 2009

ORDERED that the Borough of Riverdale and the Riverdale Planning Board show cause before this Court on September 16, 2009 at 10:30 a.m. as to the

enforcement of plaintiff's rights pursuant to the August 21, 1996 Judgment and August 22, 1998 Consent Order and as to why an injunction should not be issued permitting defendant, the New York Susquehanna and Western Railway Corporation, the right to immediately proceed with the use of its yard for the transloading and temporary storage of brick products; and

IT IS FURTHER ORDERED that the Borough of Riverdale and the Riverdale Planning Board shall by August 31, 2009 file with the Court and serve upon NYSW's attorneys an answering affidavit, response or motion with supporting papers, and defendant may reply by September 11, 2009, and

IT IS FURTHER ORDERED that a copy of this Order, certified by defendant's attorneys to be a true copy, together with copies of the Memorandum and Certification and supporting exhibits be served upon the Borough of Riverdale and its counsel and the Riverdale Planning Board and its counsel by overnight mail by August 10, 2009.

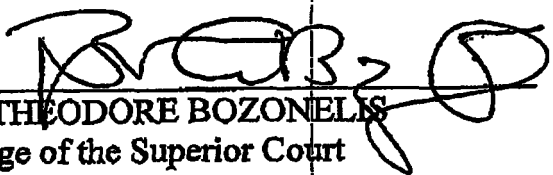

B. THEODORE BOZONELIS
Judge of the Superior Court
Assignment Judge

EXHIBIT 6

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
MORRIS COUNTY
DOCKET NO. MRS-L-2297-96
APP DIV. _____

BOROUGH OF RIVERDALE,

Plaintiff,

vs.

NEW YORK SUSQUEHANNA WESTERN
RAILWAY CORPORATION,

Defendants.

TRANSCRIPT

OF

ORDER TO SHOW CAUSE

Place: Morris County Courthouse
Washington & Court Streets
Morristown, New Jersey

Date: September 16, 2009

B E F O R E:

HONORABLE B. THEODORE BOZONELIS, A.J.S.C.

TRANSCRIPT ORDERED BY:

JOHN K. FIORILLA, ESQ.,
(Capehart & Scatchard, PA)

Video Recorded by: Deidra Johnson

////////////////////////////////////
METRO TRANSCRIPTS, L.L.C.

Valerie Anderson
316 Ann Street
Randolph, New Jersey 07869
(973) 659-9494
////////////////////////////////////

A P P E A R A N C E S:

JOHN M. BARBARULA, ESQ.,
(John M. Barbarula, Esq.,
Attorney for Borough of Riverdale Planning Board.

ROBERT H. OOSTDYK, ESQ.,
(Johnson, Murphy, Hubner, McKeon, Wubbenhorst,
Bucco & Appelt, PC),
Attorney for the Borough of Riverdale.

JOHN K. FIORILLA, ESQ.,
(Capehart & Scatchard, PA),
Attorney for the Defendant.

Video Recorded by: Deidra Johnson

////////////////////////////////////
METRO TRANSCRIPTS, L.L.C.

Valerie Anderson
316 Ann Street
Randolph, New Jersey 07869
(973) 659-9494
////////////////////////////////////

I N D E X

9/16/09

ORDER TO SHOW CAUSE

<u>Argument</u>	<u>Page</u>
By Mr. Fiorilla	4, 43
By Mr. Oostdyk	16, 26
By Mr. Barbarula	22, 45
<u>Court Decision</u>	47

Colloquy

4

THE COURT: Have a seat. We'll go on the record in the Borough of Riverdale and New York Susquehanna and Western Railway Corporation pursuant to the Court's August 6th, 2009, order with respect to issues concerning enforcement of litigant's rights.

Appearances?

MR. BARBARULA: Your Honor, John Barbarula appearing on behalf of the Borough of Riverdale Planning Board.

MR. OOSTDYK: Robert Oostdyk appearing on behalf of the Borough of Riverdale.

MR. FIORILLA: Your Honor, John K. Fiorilla, Capehart and Scatchard, for the New York Susquehanna Western Railroad Company. This is Mr. Nathan Feno (phonetic). He's the president of the railroad, Your Honor.

THE COURT: Yes. All right. I've had the opportunity to review the submissions of counsel. I thank you for your thorough memorandums with respect to this matter, and I will hear from you in this regard with respect to seeking to enforce litigant's rights.

MR. FIORILLA: Thank you, Your Honor. Your Honor, we're here today on an order to show cause asking the Court to enforce the previous order of this Court entered on August 21, 1996. It's a long time

1 ago, but the issues really haven't changed.

2 In that case, Judge Stanton one of the first
3 time in the United States faced the question that's
4 before the Court today; and his order in this case he
5 felt was very clear. He found that the use of the
6 railroad's facilities by the railroad in Riverdale was
7 preempted. He also put in his order that the railroad
8 had to go to the Borough and review all the health and
9 safety issues and that -- and that they would then --
10 and during that time, they could operate the facility
11 and that that would continue, and that's how the case
12 would resolve.

13 Eventually, the Supreme Court of New Jersey
14 read Judge Stanton's order, and in the case of
15 Ridgefield Park really determined that the law of New
16 Jersey should be very much the same thing, that when a
17 railroad has -- is constructing a facility, wants to
18 operate a facility, they go back to the township or the
19 municipality, and they discuss with them the health and
20 safety issues.

21 But in both cases, it was very clear that
22 zoning was not an issue. That's the same thing here,
23 very much the same thing.

24 As time has gone on, very many other courts
25 have opined on this issue. And they have found that if

1 the railroad owns or leases the facility and operates
2 the facility itself or through one of its contract
3 agents that preemption would, generally speaking,
4 apply. And that's what happened here. There isn't any
5 question that that's what's happening here.

6 In this case, the reason why the railroad
7 returned to the municipality was because under Judge
8 Stanton's order, it was changing the type of product
9 that it was going to transload at this yard. Now this
10 lot was always a team track from many years ago, and a
11 team track is called that because a team means a team
12 of horses with a buckboard. The name team track,
13 you'll find it direction in 49 U.S.C. in the ICCTA.
14 They talk about a team track. And, therefore, the
15 Congress even then is -- is talking about a
16 transloading situation in which one form of
17 transportation transloads to another involving a
18 railroad. And that clearly was what this type of
19 facility has always been long before we were
20 transloading corn syrup.

21 From time to time, the facility goes without
22 any business. Well, that's -- that's business, and
23 these things happen. Sometimes you just -- they'll go
24 for years without really a lot of business taking place
25 at a facility. But from time to time, those things

1 change. The business changes, and the railroad once
2 again uses its facility for that purpose. That's
3 exactly what's happening here. The only difference
4 here is they want to transload brick instead of the
5 corn syrup.

6 Now it's very interesting to note that going
7 back to the town was certainly not a waste for the
8 railroad. There was a safety issue that came before
9 this Board, and I'm sure you looked at the transcript.
10 You saw what that issue was. It had to do with a water
11 pipe that was underneath and exactly how we would
12 construct and the use of the facility changed as a
13 result of that safety issue. So it's certainly not a
14 waste of time, nor are we suggesting that it's a waste
15 of time to go to the municipality and have these health
16 and safety discussions.

17 However, after three -- three different
18 sessions, it became clear that that wasn't the issue
19 before this Planning Board, that there issue was more
20 of a zoning issue, that they wanted us somewhere else,
21 and they said it. And reading the transcript, you'll
22 see it. We said to them in the last hearing and I
23 think -- are there any other health or safety issues we
24 haven't addressed that are on your mind, and they --
25 they had none.

1 That's a big issue, and I think the Court
2 should -- should look to that because the railroad has
3 never -- there was never a time when the railroad said
4 enough is enough. The railroad said to the town, what
5 other health and safety issues do you have, let's
6 address them, let's make sure we can do it right. And
7 those were addressed with, for example, our engineers
8 and the Borough's engineer who was very cooperative by
9 the way in making sure that this would be a safe
10 operation. And there's no question if you take a look
11 that there's no issue about safety now as to how the --
12 how the facility would be operated.

13 The railroad -- and by the way, the initial
14 contract that we showed to the Borough is the same
15 contract for the most part as we had for the corn syrup
16 facility here when we had a contractor transloading the
17 corn syrup.

18 However, there were issues brought up at the
19 time. We have been saying all along that we would
20 control this and that the brick company would pay us
21 for this, but what we did do was we went back, and we
22 rewrote the contract to make sure that was very clear.
23 And we did it because that's -- first of all, that was
24 our testimony. Second of all, that's how we operated
25 it before. But third of all, we wanted to make sure

1 there wasn't any question about that. So we went back,
2 and we did put it in the contract.

3 And there's no question that the brick
4 company's going to pay the railroad for these services
5 and that -- that our -- our transloader will do that.
6 It's a wholly owned subsidiary of the railroad. It's
7 called Susquehanna Bulk Transfer. It operates four
8 other facilities for the railroad that transload
9 different product. There's one in Sparta that
10 transloads sugar, and they do -- they do it there.
11 There's some in North Bergen which they -- hazardous
12 waste and municipal waste in which they transload, and
13 they do that on behalf of the railroad there.

14 So this is the -- is the common way the
15 railroad has been operating, and they -- so these are
16 employees of their wholly owned subsidiary that do
17 this. That's how we intend to operate the facility at
18 Riverdale.

19 We feel that our briefs, our first and our
20 second brief, addressed all the issues that we had
21 brought initially before the Board, that the Board
22 brought to our attention, and that were brought before
23 the Court by the reply brief of the Borough of
24 Riverdale. So --

25 THE COURT: You are resting also on -- on the

1 position that by virtue of the town seeking to go
2 before the Surface Board that they cannot make this a
3 precondition to your application to move forward and
4 basically conclude with the Planning Board.

5 MR. FIORILLA: That's right, Your Honor. In
6 our -- in our most recent brief, I think we went into
7 some of the detail as to the fact that the Surface
8 Transportation Board -- that courts have been deciding
9 this issue, and the Surface Transportation Board has
10 been looking to the courts.

11 In this very case, when it was first heard,
12 the Surface Transportation Board was very much
13 impressed by Judge Stanton's opinion and about the --
14 and by the consent order and said, it looks fine to us.
15 They didn't -- there was no reason for them to make
16 decisions. They look to the courts to interpret
17 federal law be they State Court or Federal Court, and
18 both do that throughout the whole United States. It's
19 not an unusual situation.

20 We're here in State Court by the way because
21 we were sued by the township -- by the Borough, and
22 there's no other (indiscernible). So we're here. And
23 there's -- there was nothing unusual about. The
24 Surface Transportation Board sees that every day when
25 people show them cases, and they follow what the courts

1 say. And, in fact, in the Surface Transportation
2 Board's opinions when they do have a proceeding, they
3 cite to all these court cases as being what the law is.
4 So they're not there trying to supercede courts or
5 change courts or whatever. That's not what they're
6 doing. They have no problem with the courts
7 interpreting the law written by Congress, and they --
8 they do follow them.

9 THE COURT: Let me ask you another question
10 in this regard.

11 MR. FIORILLA: Yes.

12 THE COURT: The town has chosen to go to the
13 Surface Transportation Board to get their opinion as to
14 whether they can settle the controversy. Is it the
15 railway's position that they're not entitled to do
16 this?

17 MR. FIORILLA: It is our position that --
18 that there -- there really is no controversy for the
19 Surface Transportation Board to find. This Court
20 previously and hopefully now will resolve the issue.
21 And if they were to go because anybody can file, and
22 they haven't filed yet, if they were to go --

23 THE COURT: Oh, I think they --

24 MR. FIORILLA: Our --

25 THE COURT: I thought they had filed.

1 MR. FIORILLA: No. Not that I --

2 MR. OOSTDYK: I'll clarify that when it's my
3 turn.

4 MR. FIORILLA: Okay. Well, I mean, all I
5 know is I -- I watch the website every day. You have
6 to file on a website, and we haven't -- and we haven't
7 been served, either. So, I mean --

8 THE COURT: Okay.

9 MR. FIORILLA: Between not being on the
10 website and not being served, that's what I base that
11 on.

12 THE COURT: All right.

13 MR. FIORILLA: I -- Judge, but I think that
14 if -- if they do, in fact, I mean, our position with --
15 with the Surface Transportation Board will be there --
16 there's no need for you to open a proceeding here, that
17 this issue's been decided, and that's how we feel they
18 will come out. I mean --

19 THE COURT: Have New Jersey courts, though,
20 ever decided this issue? Even in Ridgefield Park, both
21 in the Appellate Division and the Supreme Court and in
22 Judge Stanton's decision, they basically say,
23 preemption and certain health and safety issues can be
24 decided by -- by local board authorities but the rest
25 of it, we're not really going to deal with. And even

1 in the Supreme Court decision in Ridgefield Park when
2 they talk about the location of the facility and
3 everything, they say, nothing we say here prevents you
4 from, Town, from -- if you disagree with this or
5 disagree with what the railroad's doing to go before
6 the Surface Transportation Board.

7 MR. FIORILLA: Well, that's true, but the
8 Surface Transportation Board will make a decision on
9 its own based on its --

10 THE COURT: Right.

11 MR. FIORILLA: -- on its feel.

12 THE COURT: Yeah.

13 MR. FIORILLA: I mean, it may very well say,
14 look, you know, this has been a pretty well -- well-
15 decided issue, it is a well-decided issue, there's no
16 reason for us to go into this again.

17 We have a very recent decision, City of
18 Alexandria which we set the parameters, and the
19 parameters appear to be met. So, you know, they're not
20 looking for cases. They're -- and they're not in a
21 situation like --

22 THE COURT: Well, you really fall under the
23 Third Circuit Jackson decision, don't you?

24 MR. FIORILLA: Well, yes, we do. And, of
25 course, Jackson is a case involving this railroad in

1 North Bergen and -- and its facilities there, and that
2 is a New Jersey case in a sense that it was in the --

3 THE COURT: Right.

4 MR. FIORILLA: -- District Court, but it
5 involves the State of New Jersey as a party.

6 THE COURT: Yes. We're -- we're bound by
7 Third Circuit --

8 MR. FIORILLA: Sure.

9 THE COURT: -- decisions.

10 MR. FIORILLA: And, you know, so but the
11 situation is that's exactly where we went as far as
12 Jackson was concerned. There wasn't too much question
13 about the preemption part of it and as far as the
14 zoning part of it. I mean, that's pretty well clear.
15 There were other -- there were other issues that were
16 involved in that case, but they don't apply here.

17 And -- and here, we have a very simple
18 situation where it's really loading and unloading
19 brick. There is a storage issue. I think the storage
20 issue is talked about in our briefs. It's clearly part
21 of transportation. The federal law says storage and
22 expects that it'll be part of transportation.

23 And I think that was explained in the -- at
24 the hearing by the representations of Tri State Brick
25 as to why it gets stored and how it gets stored and how

1 it gets delivered because it's a situation where
2 they're buying a lot of bricks to build a building like
3 this one, but they can't put them all on site at once
4 because there's no place to put them. And -- and then
5 they're delivered as that continues to proceed. They
6 may have to buy them in bulk by -- and it comes by
7 train say from Utah or Alabama, and they have to come
8 here or somewhere to be unloaded and then sent out to
9 exact job sites.

10 And that's what the storage is about. It's a
11 temporary thing as they're building a project, and --
12 and that was explained in the transcript to the Board
13 by the representatives of the brick company as to, you
14 know, what -- what the storage part of this was all
15 about.

16 And the railroads for years have provided
17 this kind of service for lumber, for building
18 materials, for brick, for certain other -- for corn
19 syrup, and several other types of commodities. And
20 it's a common type of situation that they do on their
21 own property, and that's -- that's what the railroad
22 would expect to do at this facility here.

23 THE COURT: Okay. I'll hear from -- who
24 wishes to speak?

25 MR. OOSTDYK: Sure. I'll start.

1 THE COURT: And then I'll give you an
2 opportunity to respond.

3 MR. FIORILLA: Certainly.

4 MR. OOSTDYK: Thank you.

5 THE COURT: Mr. Oostdyk, yes.

6 MR. OOSTDYK: I think the narrow here, Judge,
7 really is did the Borough -- did Riverdale acting
8 through its Planning Board violate the judgment and
9 consent order issued by the Court in this case. So I
10 think we have to start with what is the action
11 complained of. What are they complaining Riverdale did
12 that was in violation of the order in this case?

13 I think the -- the way this -- the way this
14 began was Tri State under the auspices of the railroad
15 began moving bricks onto the Riverdale site -- trucking
16 in bricks at that point. Riverdale observed it, said
17 to them, wait a minute, you can't be bringing bricks
18 onto this site, you haven't gone through any kind of
19 review process to do it. The railroad said, yes, it's
20 a preempted exempt issue, we can bring bricks on.

21 There ended up being an agreement between
22 Riverdale and the railroad recognizing this case, this
23 consent order, this judgment where Riverdale said,
24 well, maybe this is a preempted issue, maybe you're
25 correct, but even if it is a preempted issue, you need

1 to bring this action before the Board which granted is
2 not a site plan review. We all understood what it was.
3 It was as -- as counsel explained, just a health safety
4 review that was provided for in the consent order.
5 That was done.

6 That consent order, though, and -- and I
7 think Riverdale did recognize the consent order, did
8 recognize the judgment, and agreed that that process
9 could be -- could be brought forward.

10 It then goes to the Board. The Board, while
11 it didn't articulate this in its discussion in where it
12 went, when you read the transcript, you can see what
13 happens. The Board starts with, are we really talking
14 about a preempted use again.

15 This isn't the use that was before Judge
16 Stanton as much as counsel -- and I understand there's
17 similarities to the use. It's the same use if you go
18 very broad and say it's transloading. Yes. What was
19 before Judge Stanton in the corn syrup case was
20 transloading. There's an element of what's being used
21 here as transloading.

22 So it -- it isn't incorrect to say there are
23 similarities in the use, but I think it is incorrect to
24 say it is exactly the same thing because it isn't
25 exactly the same thing. And that is what the Board

1 honed in on. The Board tried to understand whether or
2 not the use that was being proposed for this site was,
3 in fact, a preempted use.

4 Now we could step back and say, well, was
5 that -- was the Board wrong to do that? Did the Board
6 have any business really beginning this process by
7 questioning whether or not it was a preempted use?
8 Didn't the Court it was a preempted use already? My
9 answer to that would be I don't think the Board was
10 wrong, and I'll tell you why I don't think the Board
11 was wrong. I don't think Judge Stanton determined that
12 any use the railroad wanted to make of that property
13 was preempted. He wouldn't have determined that. The
14 preemption goes by -- goes -- is -- the preemption
15 occurs because of federal law. Federal law very
16 clearly defines what use is preempted, and federal law
17 does not provide that every use of railroad property is
18 a preempted use.

19 The federal law through the STB and through
20 the federal cases make it very clear there's two
21 components that you look at to determine whether or not
22 you're talking about a preempted use. One of those
23 components is is the use transportation in the broad
24 sense that that's defined under federal law. Well,
25 Your Honor has clearly reviewed the federal cases and

1 the STB items we provided in our brief. That is not
2 always such a clear easy determination. The courts
3 grapple with it. The STB grapples with it.

4 Transloading, is that transportation?
5 Absolutely. If it's in -- in a pure sense,
6 transloading is a transportation activity. When you go
7 beyond the transloading, though, and start having a
8 storage facility which is what's proposed here, not --
9 it's not like the corn syrup. The corn syrup was the
10 corn syrup remains on a railroad car, is -- is
11 offloaded, and then brought -- taken off the site to
12 the ultimate consumer.

13 In this case, bricks would be brought to the
14 site. In fact, this controversy begins when bricks are
15 trucked into the site as part of the storage operation
16 by the -- by Tri State Brick and Stone because they're
17 needing to leave another railroad facility where they
18 are as was testified before the Board -- needing to get
19 off of that and move their bricks onto the Riverdale
20 site.

21 Now is there components of this that are --
22 that clearly involve transportation? Of course, there
23 are components of it that clearly involve
24 transportation. Taking it off the railroad, putting it
25 on a truck, and moving it to an ultimate site is

1 clearly railroad transportation. But in due respect,
2 I'm not sure it's all that simple, and I am sure that
3 it was not the same use that was discussed before Judge
4 Stanton when he was here. There are components to this
5 that are very different to that use.

6 The second issue in determining whether an
7 item is preempted is who's engaged in the activity.
8 And I think in our brief, we pointed to you some court
9 cases as well as some STB decisions including the STB
10 decision involving this very Tri State Brick and Stone
11 Company, not the railroad but Tri State Brick and Stone
12 Company in New York. In New York, what happened is
13 they were conducting what looks to us to be a very
14 similar operation in Brooklyn. There was an objection
15 by -- in that case, the owner of the property was the
16 City of New York. So there's --

17 THE COURT: Yeah.

18 MR. OOSTDYK: There's --

19 THE COURT: Yeah.

20 MR. OOSTDYK: There's -- yeah, but --

21 THE COURT: The railroad didn't own the
22 property.

23 MR. OOSTDYK: The railroad didn't own it, but
24 the principle was is the -- is it preempted. And the
25 preemption issue -- in discussing the preemption issue,

1 the Court goes -- the -- the STB, excuse me, goes into
2 this issue of you need to look at who's engaged in the
3 use.

4 Now the Board focused on that issue. They
5 tried to get some information about it in its decision
6 because the Board felt that before they could say it's
7 exempt from -- it isn't covered, they don't have
8 jurisdiction over it, they needed to understand what
9 the use was and determine whether or not the use was
10 preempted. And in a sense --

11 THE COURT: But why are they engaging in that
12 function at all?

13 MR. OOSTDYK: Well, because --

14 THE COURT: And here's --

15 MR. OOSTDYK: Yeah.

16 THE COURT: -- the question, Mr. Oostdyk,
17 which -- which you're --

18 MR. OOSTDYK: Yeah.

19 THE COURT: -- kind of hitting on which is
20 whether you take Judge Stanton's consent order or the
21 subsequent cases that have basically crystallized the
22 same principles --

23 MR. OOSTDYK: Yes.

24 THE COURT: -- that he talked about, the
25 Board's concern is one of health and safety on the

1 facility. They can't impose a precondition, can they,
2 on the -- on the railroad about preemption issues that
3 you have to first get -- you, railway, have to first
4 convince us that this is preempted, and then we'll
5 decide the health and safety issues which creates all
6 kinds of delays --

7 MR. OOSTDYK: Uh-huh.

8 THE COURT: -- which is basically what all
9 the federal case law is talking about should not be
10 done. So --

11 MR. OOSTDYK: As long as it's preempted.

12 THE COURT: So what is it that the Board was
13 doing? Why did they -- they go through three hearings,
14 and then they don't act.

15 MR. OOSTDYK: Uh-huh.

16 THE COURT: I -- I mean, why -- if that's
17 your position, why wouldn't they have done it -- I'm
18 not saying it would have been right, but why --

19 MR. OOSTDYK: Right.

20 THE COURT: -- wouldn't they have said it
21 right up front?

22 MR. BARBARULA: And I -- may I address that,
23 Judge?

24 THE COURT: All right.

25 MR. BARBARULA: Judge, what happened was that

1 they -- the planner's report was not done at the
2 beginning. The first hearing that was not there. And
3 the main reason that they did it is based upon the
4 planner's report, it brought up a real question whether
5 or not the railroad was within the four corners of this
6 settlement agreement.

7 And the difference as Mr. Oostdyk has clearly
8 demonstrated, when -- I lived this and I litigated
9 this. We were out to the Federal Court, and the
10 Federal Court determined that we had to be back here,
11 and I did with Mr. -- with -- with my adversary. We
12 did the whole cases. And throughout -- and I was even
13 quoted in their moving papers saying, yes, the issue
14 was preempted.

15 But one of the things you look at here is the
16 Board tried to crystalize, well, what is the operation,
17 who's operating it. When they asked Mr. Formica
18 (phonetic), the -- the answers were not as forthcoming
19 and -- and as clearly pointed out in Mr. Bright's brief
20 that it created the issues of who was actually
21 operating and who was actually storing. And one of the
22 issues that -- when you came up to that aspect, you
23 look at what was purely the facility under the old
24 order.

25 Railroad tankers were offloaded, brought on

1 the siding, left there as a tanker, hooked up to -- to
2 generators and pipes, and the product was on the rails.
3 They were still on the wheels. If the brick was still
4 on the wheels, I said that would be the end of -- end
5 of the story because it was still on flatbeds on -- on
6 the side cars. They could stay there forever because
7 they're still on the rails.

8 What happened was the reason it didn't happen
9 in the beginning -- and you're right. In a perfect
10 world, we should have determined whether or not there
11 was a real issue of -- of jurisdiction the first date.
12 And as it developed and based upon the planner's
13 report, the Board was really concerned that here's a
14 situation where this isn't the railroad doing it.

15 And I think that one of the obvious things is
16 -- is that you have here is that now the defendant
17 tries to say, we changed the contract to make it fit
18 the testimony. Well, that's one of the reasons that
19 the Board said, wait a minute, I think I have a real
20 problem here that this isn't really the railroad
21 operating, it's Formica operating.

22 And how it originally started is what Mr.
23 Oostdyk said. They had to move I think from Roxbury or
24 one of the other facilities where -- where they were,
25 and they moved a lot of the product in by truck. So

1 through the process -- it wasn't a deliberate act of we
2 waited 'til halfway through the process. It was
3 through the process and the answers being received from
4 Formica and his representatives that -- and then the
5 planner's report that brought up, well, you know what,
6 maybe this is a trucking operation to which we could
7 ask for a site plan, to which we could ask for more
8 details, a traffic report and that type of thing, and
9 maybe it's not just health and safety such as putting
10 tons of brick on top of the water. And that's what
11 happened. We did not do it in the first hearing.

12 THE COURT: Okay. No. I --

13 MR. BARBARULA: And -- and it could have --

14 THE COURT: I appreciate that.

15 MR. BARBARULA: -- been done that way.

16 THE COURT: I appreciate that --

17 MR. BARBARULA: Thank you.

18 THE COURT: -- explanation.

19 MR. BARBARULA: I didn't --

20 THE COURT: It still does not --

21 MR. BARBARULA: I just wanted to explain to
22 the Court what it was.

23 THE COURT: Yes. And I understand how the
24 Board proceeded in that regard. It still does not
25 answer my question, though, which is what authority the

1 Board would have to make this a precondition. In other
2 words, look, the -- the issue is -- and the case law is
3 relatively clear in this regard. Okay. A board can --
4 can weigh in on health and safety issues and the like,
5 but preemption issues are way beyond what a board
6 should be doing, and they can't impose -- can they
7 impose a precondition that, we're not going to decide
8 the health and safety issues, and we're going to tell
9 you, railway, that you can't do this until you satisfy
10 us that this is preempted.

11 That's the real key here in this regard, and
12 does the Board have any say in that regard? Should the
13 Board simply have finished their -- their hearing?
14 They could certainly raise concerns about the type of
15 facility or whatever but certainly finish their hearing
16 and say, this is what we require for health and safety.

17 MR. OOSTDYK: Yes.

18 THE COURT: And other issues are for somebody
19 else to decide, not the Planning Board.

20 MR. OOSTDYK: Well, and that's focus on that
21 a minute. First of all, at the end of the day, they
22 did decide they couldn't decide it. Now they -- you
23 know, they decided at the end of the day this was
24 beyond their ability to deal with.

25 THE COURT: Okay. What I'm saying is isn't

1 that wrong.

2 MR. OOSTDYK: For them to have decided that

3 --

4 THE COURT: Shouldn't they have decided it --

5 MR. OOSTDYK: Well --

6 THE COURT: -- on health and safety issues --

7 MR. OOSTDYK: Here's --

8 THE COURT: -- and then said if they wanted
9 to say --

10 MR. OOSTDYK: Right.

11 THE COURT: -- and then say, look, issues of
12 preemption are for somebody else to decide, that's not
13 our function.

14 MR. OOSTDYK: Right. But here's the --
15 here's the problem they find themselves in.

16 Jurisdictionally, pursuant to this court order, they
17 are to hear these health, safety, welfare issues --

18 THE COURT: Right.

19 MR. OOSTDYK: -- when you have a preempted
20 use.

21 THE COURT: I don't --

22 MR. OOSTDYK: Otherwise, they're not because

23 --

24 THE COURT: I don't -- where does it say that
25 in the consent order?

1 MR. OOSTDYK: How could it not? I mean, if
2 there was going to be -- if Shop Rite was going to go
3 on the property or an apartment building, we wouldn't
4 say the Board should just hear it as a health, safety,
5 welfare issue. It only makes sense in conjunction with
6 the use being preempted. The Board's limited role in
7 this process only makes any sense in the context of a
8 preempted use.

9 If you're talking about a non-preempted use,
10 no -- Judge Stanton certainly would not have said in
11 the case that if the use was -- he -- in order to do
12 what he did in that case, he had to determine that it
13 was a preempted use.

14 THE COURT: Yeah. But, look, we have to --
15 we have to impose some practicality here. You're
16 absolutely --

17 MR. OOSTDYK: Yes.

18 THE COURT: -- right. If you put a Shop Rite

19 --

20 MR. OOSTDYK: Right.

21 THE COURT: -- on there, that's a totally
22 different issue.

23 MR. OOSTDYK: Right.

24 THE COURT: Okay? But we have to impose some
25 practicality here. All right? Railroad coming in and

1 railroad taking bricks off railroad cars, putting them
2 in their facility, and somebody else is picking them up
3 or the railroad arranged to pick them up, whatever,
4 okay, in that regard. Why should the Board -- now the
5 Board can certainly say, gee, where -- you know, if
6 this is storage, we're not sure it's preempted or not
7 --

8 MR. OOSTDYK: Uh-huh.

9 THE COURT: But why should the Board be
10 putting some precondition on the railway when, indeed,
11 this is preempted -- this is a preempted area in that
12 respect? They can decide health and safety issues on
13 the facility. And if they have concerns about whether
14 storage qualifies, that's for -- that's for another
15 court to decide or the Surface --

16 MR. OOSTDYK: Absolutely.

17 THE COURT: -- Transportation Board.

18 MR. OOSTDYK: Absolutely. I think --

19 THE COURT: But they're saying --

20 MR. OOSTDYK: Yeah.

21 THE COURT: The Board is saying and the town
22 is saying, you can't operate, railway, until you get
23 that decision.

24 MR. OOSTDYK: Well, but the -- the other side
25 of that coin would be railway operates, then we go for

1 a decision. I mean, preemption is -- to say that local
2 land use is preempted is a important determination. I
3 understand where -- where Your Honor's coming from. I
4 -- I -- you feel it. You could feel the Board wasn't
5 sure what the heck to do. So, I mean, we all
6 understand that -- that the Board is not equipped to
7 make that decision in a narrow -- when you're dealing
8 with an issue which has nuances and is narrow and is
9 going to be a very difficult legal issue.

10 THE COURT: Uh-huh.

11 MR. OOSTDYK: But what is the Board and what
12 is the municipality to do when faced with the railroad
13 coming in and saying it's a preempted use. Some very
14 obvious -- there's some very obvious issues that come
15 out, not the least of which is there's a whole lot of
16 cases that talk about the railroad doing the
17 transloading. We're talking about another company
18 which, by the way, is now at the third railway stop
19 because of issues of jurisdiction and government
20 regulations coming there.

21 Now is the -- is the fair thing for the
22 municipality to do then is to step back, say, railroad,
23 start it, start doing it, we'll go to the -- I mean,
24 the -- that's the issue, we'll go to the Surface
25 Transportation Board and get a determination but after

1 you start. It -- it -- it's kind of -- it -- to -- to
2 put the cart before the horse. Start the use, and then
3 we'll determine whether the use is --

4 THE COURT: Well, the question is --

5 MR. OOSTDYK: -- is okay.

6 THE COURT: -- who bears the burden in that
7 regard.

8 MR. OOSTDYK: Well --

9 THE COURT: Okay? That's the real issue.
10 All right?

11 MR. OOSTDYK: And --

12 THE COURT: And Ridgefield Park dealt with
13 this issue.

14 MR. OOSTDYK: It did.

15 THE COURT: Ridgefield Park dealt with the
16 issue. The Supreme Court said in that decision --

17 Actually, Brendan --

18 I'm going to just get the --

19 MR. OOSTDYK: Sure.

20 THE COURT: -- actual paragraph.

21 Can you go in my chambers and give me those
22 two books, the green book and -- they're on my desk.
23 They're right in back. Okay?

24 I'm going to read the language to you.

25 MR. OOSTDYK: Yeah.

1 THE COURT: But the Supreme Court actually
2 said in that decision that you don't put these kind of
3 preconditions. And if -- in that case, they were
4 talking about siting the facility.

5 MR. OOSTDYK: Correct.

6 THE COURT: If, indeed, the town had a
7 problem with siting the facility, the Supreme Court
8 said, if you think that's arbitrary, then go back to
9 the Surface Transportation Board and get a decision in
10 that regard.

11 MR. OOSTDYK: Uh-huh.

12 THE COURT: But neither the Appellate
13 Division in Ridgefield Park --

14 MR. OOSTDYK: Uh-huh.

15 THE COURT: -- or the Supreme Court put any
16 kind of preconditions or stays on the railway.
17 Basically they said, you can -- we're not stopping you,
18 we don't have the authority to stop you --

19 MR. OOSTDYK: Yes.

20 THE COURT: -- you can go ahead and do
21 whatever you want to do, and, town, if you feel that
22 that's bad, you can go before the Surface Review Board
23 (sic).

24 MR. OOSTDYK: But --

25 THE COURT: It's at 163 N.J. 446, Page 462.

1 And here's what it says: "Because zoning regulations
2 imposed by the village clearly could be used to defeat
3 the railway's maintenance and upgrading activities,
4 thus, interfering with the efficiency of railroad
5 operations that are part of interstate commerce, the
6 village may not dictate the location on its right of
7 way of the railroad's maintenance facility. In the
8 event the village remains of the view that the
9 railway's -- railroad's siting decision is arbitrary,
10 unreasonable, and contrary to the interests of its
11 citizens, the village is free to seek relief on the
12 issue from the STB."

13 MR. OOSTDYK: What's different with all due
14 respect in that case from what we have here is here we
15 have a consent order where it was agreed that they
16 would go before the Board. It was agreed that they
17 would do certain things which clearly do not work with
18 this use, among the least of it the method of
19 transloading -- the mechanical method of transloading.

20 THE COURT: So you believe that the reading
21 of the consent order -- Judge Stanton's order --

22 MR. OOSTDYK: Right.

23 THE COURT: -- and the consent order together
24 is that if there is a change of use --

25 MR. OOSTDYK: Right.

1 THE COURT: -- then the Planning Board
2 decides the issue. You don't read that to be that the
3 -- when there's a change of use the only function of
4 the Planning Board is on health and safety.

5 MR. OOSTDYK: I wouldn't -- I wouldn't -- no.
6 I wouldn't make that statement. I -- I -- I would say
7 that the Planning Board's jurisdiction is obviously
8 limited by -- within that order of the Planning Board's
9 --

10 THE COURT: Right.

11 MR. OOSTDYK: Obviously that's limited to
12 that.

13 THE COURT: So we're agreed on that.

14 MR. OOSTDYK: So -- but --

15 THE COURT: And I think that's absolutely
16 correct.

17 MR. OOSTDYK: I think it is. I think it is,
18 too.

19 THE COURT: So -- so then the question --

20 MR. OOSTDYK: Well --

21 THE COURT: -- really goes back to --

22 MR. OOSTDYK: But --

23 THE COURT: -- how can you put --

24 MR. OOSTDYK: Because --

25 THE COURT: -- a precondition on the

1 railroad.

2 MR. OOSTDYK: Because it goes back to the
3 Planning Board to make a decision, and the Planning
4 Board's faced with testimony about a use it really
5 doubts is preempted or questions is preempted. I guess
6 that becomes what is the Planning Board to do under
7 that set of circumstance.

8 I don't think, by the way, the Planning Board
9 necessarily concluded that this use is bad, won't work,
10 can't be. I think all the Planning Board concluded is
11 are we really sure it's a preempted use because if it's
12 not a preempted use, we're making a mistake. We -- if
13 it's not a preempted use and we say we have no concern
14 -- I think that's the place the Planning Board finds
15 itself, and maybe further guidance, you know, to the
16 Planning Board --

17 THE COURT: Well, I --

18 MR. OOSTDYK: -- is appropriate.

19 THE COURT: Look, I -- I'm not -- you
20 shouldn't feel that because I'm -- I'm presenting these
21 questions --

22 MR. OOSTDYK: Yeah.

23 THE COURT: -- and argument to you that I --
24 I don't think that the Planning Board was proceeding in
25 good faith. They clearly were.

1 MR. OOSTDYK: Yeah.

2 THE COURT: They had Mr. Barbarula there. He
3 was very familiar with the matter.

4 MR. OOSTDYK: Yes.

5 THE COURT: There was colloquy about whether
6 or not this qualified. They were doing what they felt
7 was necessary under the circumstances. I don't fault
8 them for it except to say that I just don't know
9 whether they would have the jurisdiction to really call
10 into question these issues of whether or not --

11 MR. OOSTDYK: Yeah.

12 THE COURT: -- what was being done here on
13 this change of use qualified for transportation under --
14 -- under the Interstate Commerce Termination Act --

15 MR. OOSTDYK: Uh-huh.

16 THE COURT: -- when by the way in 1997, we
17 have a Third Circuit -- 2007, excuse me, we have a
18 Third Circuit decision that clearly says storage
19 qualifies as transportation.

20 So, you know, the question is should the
21 Board have really done this, or should they have just
22 finished and said, we have reservations and concerns
23 about whether this new use --

24 MR. OOSTDYK: Uh-huh.

25 THE COURT: -- is a qualified use and,

1 therefore, we're calling that to the town's attention
2 in that regard.

3 MR. OOSTDYK: Understood.

4 THE COURT: That's -- that's really what I'm
5 talking about.

6 MR. OOSTDYK: Yeah. Understood. And that
7 would be an alternate way of proceeding.

8 THE COURT: Well, because otherwise, they're
9 putting a precondition on the railway building this.
10 No. The railway can go ahead and contract all of this,
11 but nothing stops the --

12 MR. OOSTDYK: Right.

13 THE COURT: -- the town --

14 MR. OOSTDYK: Right.

15 THE COURT: -- from seeking further
16 clarification I don't think from the --

17 MR. OOSTDYK: And I should clarify the
18 question as to where we're at with that filing.

19 THE COURT: Yeah.

20 MR. OOSTDYK: The decision was made to await
21 today's -- await today's -- it's ready. We'll file it
22 this afternoon unless Your Honor stops it.

23 THE COURT: Okay.

24 MR. OOSTDYK: It was just in --

25 THE COURT: Yes.

1 MR. OOSTDYK: -- respect to this Court --

2 THE COURT: Okay.

3 MR. OOSTDYK: -- we felt once that was --

4 THE COURT: Fine.

5 MR. OOSTDYK: -- that -- this motion was
6 filed, we should hold up on that.

7 THE COURT: I understand.

8 MR. OOSTDYK: So that's where that -- that's
9 where that stands. I -- I think we still get to the
10 problem of if not the Board making this decision, then
11 how does the decision get made before the use takes
12 place? Place clearly the railroad's coming to us
13 candidly describing the use and telling us among other
14 things there's going to be a method of transloading
15 used that the consent order entered into with this
16 agreement signed by Judge Stanton says they're not to
17 do.

18 Now do I think that they're forever bound to
19 change or that can be part of a change of use
20 application? Of course. They have -- there's
21 standards under rule, you know, under change of
22 circumstances that -- for them to argue that now they
23 have to do a different type of transloading, there's a
24 different product that transloading they agreed to do
25 -- the method of transloading they agreed to do was --

1 they agreed to do because they had in mind a particular
2 type of operation. Now that the operation changes,
3 that restriction that they agreed to shouldn't apply.

4 There's good arguments that can be made.
5 They haven't been made yet. We're dealing -- and I --
6 I -- I still go back to we're not exactly dealing with
7 that case because we're dealing with something where
8 the Borough and the railroad sat down in good faith and
9 negotiated an agreement about what the parameters of
10 that use would be, had it presented to this Court and
11 signed by this Court. That's what's in issue today is
12 the Borough --

13 THE COURT: Well, it says if it's a change of
14 use, you have to go back before the Planning Board.

15 MR. OOSTDYK: But --

16 THE COURT: But are they going back before
17 the Board for health and safety reasons or -- look, the
18 railway's position --

19 MR. OOSTDYK: For health and safety reasons.

20 THE COURT: The railway's position is this.
21 This matter is preempted by federal statute.

22 MR. OOSTDYK: Ye.

23 THE COURT: You, Board, cannot put any
24 restrictions on us building our facility. What you can
25 do is opine and rule on health and safety issues, and

1 we will comply with that. The Board on the other hand
2 by virtue of their decision has said to the railway,
3 no, we, local authority, are going to control this,
4 it's a precondition for you to get preemption --
5 preemption support. That's the key issue here I think
6 which you recognize, which everybody recognizes.

7 MR. OOSTDYK: Yeah.

8 THE COURT: And can they do that? Are the --
9 can they do that, or is the railway correct that you
10 cannot do that, you can -- if you want to get a
11 clarification later on --

12 MR. OOSTDYK: Uh-huh.

13 THE COURT: -- you know, we can't prevent you
14 from going --

15 MR. OOSTDYK: Uh-huh.

16 THE COURT: -- to the Surface Termination
17 Board (sic), although they seem to argue that the
18 consent order can do that. But putting aside the
19 consent order --

20 MR. OOSTDYK: Uh-huh.

21 THE COURT: You certainly could do that, and
22 if it turns out that it's not railway interstate
23 commerce --

24 MR. OOSTDYK: Uh-huh.

25 THE COURT: -- use, then they would face the

1 consequences of that. But the question is where's the
2 burden, where's the balance, you know?

3 MR. OOSTDYK: Understood.

4 THE COURT: You want -- the local authority,
5 you, Riverdale, want to say, precondition, you must go
6 get a ruling on preemption or we'll apply for it --

7 MR. OOSTDYK: We'll do it. Yeah.

8 THE COURT: -- and you have to wait for that
9 before you can contract, use your facility, do
10 anything, where the railway is saying, you cannot do
11 that, town, you are a State -- local subdivision of the
12 State preempted by federal law, you cannot do that, and
13 if you want to say that we don't fall within the
14 parameters of the Interstate Commerce Termination Act,
15 you're going to have to go get that ruling --

16 MR. OOSTDYK: Uh-huh.

17 THE COURT: -- not us. That's the
18 difference.

19 MR. OOSTDYK: Which the Borough was prepared
20 to do in the Board's recommendation to the Borough. I
21 think the question is should the Board have made --
22 that you're framing is should the Board have made their
23 health, safety, welfare determination, finished that
24 up, and then in addition to that said, we recommend to
25 the Borough that they -- they bring that --

1 THE COURT: Because the consequence --

2 MR. OOSTDYK: -- because we question the
3 preemption.

4 THE COURT: The consequence which everybody
5 recognizes --

6 MR. OOSTDYK: Yeah.

7 THE COURT: -- here is that by virtue of the
8 Board not finishing up --

9 MR. OOSTDYK: Right.

10 THE COURT: -- they have made a ruling in
11 effect, and the ruling that they made was, we're not
12 giving you authority on health and safety issues,
13 therefore, you, railway, can't build your facility.

14 MR. OOSTDYK: Uh-huh. Uh-huh.

15 THE COURT: And you can't do it until you go
16 get a ruling from or somebody gets a ruling from either
17 Federal Courts or the Surface Termination Board (sic) -
18 -

19 MR. OOSTDYK: Uh-huh.

20 THE COURT: -- in that regard. So, you know,
21 the Board did make a ruling.

22 MR. OOSTDYK: Uh-huh.

23 THE COURT: They de facto made a ruling --

24 MR. OOSTDYK: Uh-huh.

25 THE COURT: -- which is now preventing the

1 railway from going forward, and --

2 MR. OOSTDYK: Well --

3 THE COURT: And their ruling was it's a
4 precondition to you going forward.

5 MR. OOSTDYK: That ruling prevents, but they
6 are also prevented by their very own consent order
7 which says they won't do what they now say they're
8 going to do which is in black and white in a consent
9 order that has not been -- has not been amended.

10 THE COURT: Is that what the consent order
11 says?

12 MR. OOSTDYK: It does. It says, we will --
13 it says transloading will be conducted by --

14 MR. FIORILLA: Your Honor, if I may?

15 THE COURT: Yes.

16 MR. FIORILLA: The order says that assuming
17 that we're transferring corn syrup. It also says in
18 the paragraph before if you're going to change that,
19 you have to go back and --

20 THE COURT: Right.

21 MR. FIORILLA: -- talk about it again. The
22 -- the reason why it's air is air is going to blow the
23 material out of one car into another. You don't blow
24 bricks out of a boxcar. So you couldn't use that.
25 That method would not apply with different type of

1 material.

2 However, Judge Stanton's order clearly looked
3 at and forward to a time when the railroad might want
4 to change what it was shipping because he puts it right
5 in this paragraph where he says, "If the railroad
6 wishes to change the use of the premises, the railroad
7 shall apply to the Borough." So they see that they
8 would change it.

9 The next paragraph talks about, "All
10 transloading must accomplished by air mode rather than
11 diesel or mechanical methods." Well, we don't have
12 diesel or mechanical methods, either, other than we're
13 going to, you know, take them out of the car. We have
14 a forklift to do that.

15 But there's no other way to unload the car,
16 Judge. I mean, there is a separate method that would,
17 you know, sort of take the -- take the bricks out of
18 the car because it's the type of commodity that we're
19 transloading.

20 THE COURT: Uh-huh.

21 MR. FIORILLA: It makes -- it makes it
22 different as to how you would do it. It's clear that
23 -- that -- that the Judge was looking at what was being
24 prepared to be transloaded and what was currently being
25 transloaded at the time he wrote this 'cause he kept

1 the facility open. The facility stayed open during the
2 time of his hearing and after his order.

3 THE COURT: Okay.

4 MR. BARBARULA: Judge --

5 THE COURT: Yes.

6 MR. BARBARULA: If I might address the point.
7 Excuse me, Mr. Oostdyk.

8 MR. OOSTDYK: That's all right.

9 MR. BARBARULA: If you go to -- if you go
10 right to the decision, the Exhibit D that plaintiff --
11 defendant rather attaches, and you look at the STB
12 Finance Docket 33466, you go to Page 389, the Court
13 here -- and you have been indicating that whether or
14 not the Board had made it a precondition. Paragraph F
15 is the category enumerating the non-transportation
16 facilities.

17 And I know the Court is saying that the Board
18 has made it a precondition and by not acting they've
19 acted, but what has -- what really developed in that
20 hearing and I'm -- and I can't tell you I was -- I talked
21 extensively about that preemption. But what the -- the
22 Board actually did and what the Board's position here
23 and the town's position here is -- what they are solely
24 doing is looking at this -- basically this particular
25 guidance from the Surface Transportation Board and

1 saying, wait a minute, who is operating and is this in
2 actuality a transportation function.

3 I think that if you look at this case, and
4 I've lived this case, that -- whether or not it's a
5 transportation function and facility is like a
6 jurisdictional issue. Such as in a regular Planning
7 Board, did they file an application, did they file
8 notices to everybody as required by statute. So it's
9 not whether or not it's a precondition. It is did the
10 applicant show the Board the jurisdictional issues.

11 And one of the things they -- they talked
12 about in that case particularly and I'm sure you've
13 read all the aspects is, well, is that -- was that a
14 manufacturing facility. And I've read the cases about
15 the storage aspects, and -- and it just -- I think that
16 we have here when they had the -- Formica operating the
17 system, it was a trucking operation. And I think that
18 was the real issue that you have to decide. That isn't
19 a precondition, but I think that the railroad when they
20 want to change the use have to come in and say -- show
21 at least the prima facie evidence that this is a
22 continuing transportation function.

23 And I think if you looked for guidance right
24 there in that section of the -- the Surface
25 Transportation rendering, I think the Board will have

--

THE COURT: Uh-huh.

MR. BARBARULA: -- sufficient guidance that way.

THE COURT: Yes. And -- and I -- I understand your argument, Mr. Barbarula, and I agree with most of what you said. I will say that the Jackson case actually referred to the Riverdale decision and that particular issue in particular and said, you know, when they were really talking in this decision about non-transportation facilities, they were really talking about manufacturing, they weren't talking about issues of storage and -- and coming off of a car. So I think the Jackson case kind of resolves that in that regard.

But I do understand your argument that the Board wants at least some prima facie evidence that this would be a transportation type of operation that clearly was a railway operation and it wasn't another business on there.

And my only concern in this regard is what I've said earlier, and that is whether the Board by not acting and making this de facto really had the authority to do that or is it preempted by federal law so that that decision has to come from the Surface

Transportation Board or from a Federal Court in that regard not losing sight of the -- our New Jersey decisions which basically deferred to -- to federal law.

I mean, even the Supreme Court although it decided certain types of relief still basically said this is -- this is a issue for -- that's been preempted in that regard. And they didn't totally reverse the Appellate Division. The Appellate Division was clear, we're not touching this, this has to go to the Surface Transportation Board, we're not looking at it at all.

The Supreme Court said, well, you know, Riverdale back in 2000, that was a preliminary decision by the Surface Transportation Board, we will say that you -- we'll decide issues such as notice and -- and issues such as health and safety concerns and we'll say that that kind of relief, access for reasonable inspections, notification, enforcement of health/safety regulations, submitting a site plan for review is okay as long as it's not the power to require approval as a condition of use. That's what our Supreme Court has said in New Jersey.

So basically what they were saying is where the burden falls here is not on the railway before the Planning Board to come forward and prove that they are

1 a preempted use. It's for the town if they are
2 challenging that to go seek federal relief in that
3 regard, but we, states, cannot interfere in the
4 railway's decision.

5 Now there are exceptions to everything, and
6 you're absolutely right. If the railway was coming
7 before this Court and saying, we're going to put a Shop
8 Rite on our premises and the town can't tell us what to
9 do in that regard 'cause this is railway premises,
10 those kind of conditions -- those kind of circumstances
11 would be so obvious that this Court would intervene and
12 say, you can't do it period and you're going to have to
13 appeal my decision.

14 But where you're getting into this gray area
15 about storage and about materials coming off of a
16 railway car, being temporarily stored, and then
17 trucking out which is clearly part of a railway
18 business, not -- not a Shop Rite, then where does the
19 burden fall? Does it fall on the railway to prove
20 their entitlement to preemption under state law, or
21 does it fall on the town to prove it? And that's
22 really the different circumstances here.

23 I understand now what the Planning Board was
24 doing and why they felt they should be doing this in
25 terms of jurisdictional issues, but a lot of this has

1 been long since decided after Judge Stanton's consent
2 order and previous order in this matter as to what the
3 parameters of preemption mean. Riverdale hadn't really
4 fully decided that issue. When I'm talking about
5 Riverdale, I'm talking about the Board's decision back
6 in 1999, you know, because it was still kind of -- kind
7 of an open question.

8 But now we have a Third Circuit decision and
9 this very defendant as the plaintiff in the Jackson
10 case basically saying -- kind of laid it out. You
11 know, they -- they first talked about the Act. Then
12 they said, well, what does transportation mean. Then
13 once they come through and said this is what
14 transportation means, then they said, okay, now that --
15 that we know what transportation means and these kind
16 of facilities fall within that, the last question to be
17 decided in that regard is -- and let me get the -- the
18 language in that respect -- is the two-part test. And
19 that is is it not unreasonably burdensome upon the
20 railway and does it not -- and whether or not it
21 discriminates against the railway.

22 But the question is who should be deciding
23 that fact-sensitive inquiry. It's not the local
24 authority, and -- and that's the real -- the real
25 problem here in that regard.

1 So having said that, let me basically
2 supplement these findings and lay it out in -- in more
3 detail with respect to what exactly we have here and
4 why I'm saying these things in this regard.

5 And I'm going to take some time to lay out
6 the history here and talk about the consent orders and
7 what's transpired since that time both in terms of our
8 statutes, federal and New Jersey decisions in that
9 regard as well as federal law.

10 In 1995/1996, the railway constructed a
11 facility on its right of way in Riverdale for customers
12 in the New York/New Jersey metropolitan area. And
13 taking advantage of preexisting rail siding, the
14 railway constructed additional improvements which
15 included rail tracks, plumbing, electrical facilities,
16 weighing scales, asphalt paving, perimeter fencing,
17 lighting, drainage, et cetera, in that regard. And
18 further, the railway contracted to operate at the
19 transload facility and provide trucks for the delivery
20 of corn syrup.

21 Initially, the Borough opposed that
22 construction and operation of the facility primarily
23 because it was located in an area zoned for residential
24 use. The railway informed the Borough at least in
25 their opinion that the application of its zoning

1 restrictions was preempted by the Interstate Commerce
2 Commission -- Interstate Commerce Termination Act at 49
3 U.S.C. 10-501B. That issue came before Judge Stanton,
4 and on August 7th, 1996, Judge Stanton ruled on the
5 request for injunctive relief and held that the
6 Borough's application of its zoning regulations was
7 preempted by the Act and that the Borough's regulation
8 of health, safety, and environmental concerns could not
9 be used as a device for terminating the facility.

10 But he also concluded that local health,
11 safety, and environmental regulations were not
12 preempted so long as the Borough did not abuse the
13 regulation or deny the facility the right to operate.

14 Now the initial decision is important because
15 Judge Stanton wasn't saying, well, you know what,
16 whether or not this is preempted, corn syrup and the
17 use, let it go back to the Board and the Board can say
18 to the railway, we're not going to let you go forward
19 on this until we're satisfied that this -- this is a
20 preempted type of use. The Court didn't really have a
21 hesitation in saying when it looked at the facts of
22 what was being done here, coming off of railway cars
23 and -- and then being shipped out, that this was
24 railway business in terms of offloading and onloading
25 different materials and the like.

1 And so the Court said that the railway should
2 not be bound by local zoning regulations of plaintiff
3 as to land use and utilization as this constitutes
4 economic regulation which is preempted by the ICC
5 Termination Act of 1995. That was his decision. We
6 know now that he was basically correct in that
7 decision.

8 And then he also said, however, that you can
9 -- the Board can review -- the Borough can review the
10 application in its normal course as long as they're not
11 obstructing the use of the facility, and that had to do
12 with health and safety issues.

13 Then what happens after that is there's a
14 consent order. This is not something Judge Stanton
15 decided on the merits. There's a consent order that
16 basically said that the site was restricted to this
17 corn syrup use and that if the railway wishes to change
18 the use, the railway has to apply to the Borough of
19 Riverdale Planning Board in accordance with the Judge's
20 decision -- Judge Stanton's order. That's what it
21 says.

22 So it wasn't changing anything that Judge
23 Stanton said. It was basically saying if you change
24 your use, you've got to go back to the Planning Board
25 because obviously there might be a change in the

1 facility, a change in the structure of what's being
2 offloaded/onloaded, and the town needs to make sure
3 that the health and safety concerns are met in that
4 regard. It wasn't saying that if, indeed, that use was
5 questionable as railroad -- what Judge Stanton termed
6 as economic -- his -- his phrase which -- which was
7 picked up later in case law in that regard, economic
8 regulation, wasn't saying that the Board can make this
9 a precondition in that regard.

10 Now as I said, there's exceptions to
11 everything. And if the use was such that it didn't
12 even relate to the railroad, somebody's putting a
13 restaurant there or a Shop Rite or tries to put a gas
14 station there or whatever, then obviously the town
15 would be running into this Court to say, hey, this
16 wasn't what was meant by these decisions here and the
17 case law, and you got to stop this, Judge.

18 But when you're talking about train coming
19 in, offloading product, storing product, product being
20 taken away, you may have some gray area in terms of
21 storage and who's running the facility, who owns the
22 facility, whether there's manufacturing being done
23 which would call into question preemption issues, but
24 as our Supreme Court and Appellate Division said in
25 Ridgefield Park, you can't make it a precondition. You

1 -- the railway proceeds, and if you're challenging it,
2 then you challenge it, town, in -- in that regard. So
3 that was really the import of Judge Stanton's decisions
4 in that respect.

5 And then what happens after that? Well, the
6 STB basically picks up on that decision and says right
7 in their first paragraph, yes, he decided exclusive
8 jurisdiction, we -- we agree with this in that regard
9 in this context, okay, in that respect.

10 So what has happened since the '96/'99
11 period? Well, we know what happened in that regard.
12 And as Mr. Barbarula said, he was actively involved in
13 it. We have the Ridgefield Park decision which talked
14 about the Riverdale decisions at length in that regard.
15 And what our Supreme Court said -- well, first, what
16 our Appellate Division said was preempted, we're not
17 even going to take jurisdiction of this matter or say
18 anything about it, complaint dismissed, got to go to --
19 got to go to Federal Court or the Surface Termination
20 Board (sic).

21 The Supreme Court modified that somewhat,
22 didn't change it but modified it somewhat to say, well,
23 Riverdale as of yet issued a preliminary decision, the
24 Board did -- the Surface Transportation Board, so they
25 haven't really resolved at that point in time in 2000

1 the entire issue of preemptive effect in this respect,
2 so recognizing that we're going to take jurisdiction of
3 this and give some relief. Let's recognize this was a
4 4-3 decision of the Supreme Court. Justice Long
5 dissented, joined in by two other Justices basically
6 saying I agree with the Appellate Division, we
7 shouldn't be doing anything.

8 So what the Supreme Court then says is, we're
9 going to say the following which we believe is
10 essentially consistent with the Riverdale preliminary
11 decision, reasonable inspections, notification, let's
12 bring the town in on health and safety issues, let's
13 make sure all of that gets down, and let -- let them
14 submit the site plan review but not have the power to
15 require approval as a precondition of the use in that
16 regard, and if you disagree, town, then you can go to
17 the Surface Transportation Board and have them pursuant
18 to their statutory authority issue a declaratory order
19 to quote "terminate a controversy or remove uncertainty
20 pursuant to federal statutory law." That's what
21 they're empowered to do in that regard. And that makes
22 sense in that respect, and that's what happened in --
23 in 2000.

24 Then what happens after that is the Surface
25 Transportation Board dealt with this issue of what is

1 meant by transportation, and they dealt with this in
2 New England Transrail, a June 29th, 2007, decision.
3 And they basically said transportation is not limited
4 to the movement of a commodity while it is in a railcar
5 but includes such intricately related activities as
6 loading, unloading the material from railcars, and
7 temporary storage. Accordingly, the courts in the rail
8 industry have consistently understood that transloading
9 operations are part of rail transportation. That's
10 about as clear as you can make it in that respect.

11 And -- and, of course, other circuits other
12 than the Third Circuit, the Second Circuit had
13 basically said the same thing in that regard.

14 Well, then what happens after that? You
15 know, we have these Third Circuit decisions in Hi-Tech
16 Trans, LLC, v. New Jersey and the Third Circuit
17 decision in Susquehanna Railway and Jackson in that
18 regard, and this is our circuit. And what does the
19 Third Circuit say? Well, in Hi-Tech, there was a
20 situation which called into question the activities in
21 -- in that regard with respect to what -- what was
22 being done at the facility, who did it in that regard.
23 But that's not the situation in Jackson which basically
24 said, hey, the railway is basically doing all of this
25 and first, let's decide what is meant by

1 transportation. They clearly said storage is part of
2 transportation and quoted from all of the decisions and
3 -- that I've talked about and analyzed these decisions.

4
5 And then they basically said, well, okay, if
6 it's -- if it's transportation and it falls within --
7 this is what transloading means and it falls within
8 that -- that definition, then what's the scope of
9 preemption. And what it basically said was generally
10 it's preempted. That's it. However, we're going to --
11 there is a two-part test which is also what the Surface
12 Transportation Board has said where it's not
13 unreasonably burdensome or it doesn't discriminate
14 against the railroad's business. Then, indeed, you can
15 look to whether or not the town should be able to
16 impose restrictions under its zoning regulations 'cause
17 it doesn't interfere with the business in that regard.

18 That Third Circuit decision went on to say
19 this: "As for the unreasonably burdensome prong, the
20 most obvious component is that the substance of the
21 regulation must not be so Draconian that it prevents
22 the railroad from carrying out its business in a
23 sensible fashion. In addition, as the Green Mountain
24 court held, regulations must be settled and definite
25 enough to avoid open-ended delays. The animating idea

1 is that while states may set health, safety, and
2 environmental ground rules, those rules must be clear
3 enough that the rail carrier can follow them and the
4 State cannot easily use them as a pretext for
5 interfering with or curtailing rail service."

6 So I think what happened here is essentially
7 by the Board at the end after they talked about health
8 and safety issues saying to the railway, we're not
9 going to give you a final ruling on this and allow you
10 to proceed to build your facility because we have
11 concerns about whether or not you are a transloading
12 transportation facility for storage or whatever, and
13 you must show us that you are, go get proof in that
14 regard, and we're not -- so we're not going to continue
15 to do that. And what I'm saying in that respect in
16 analyzing everything that I've just analyzed both in
17 the New Jersey cases and the federal cases is that the
18 Board cannot do that. They simply do not have the
19 authority to do that. And by doing that, they've made
20 a de facto delay ruling which is exactly what the
21 Jackson court said should not be done.

22 And what they've done is they basically have
23 said by not ruling, they put the burden on the railway
24 to go forward and prove that they are a transportation
25 transloading facility use and that this use is such

1 that it's part of the railway business in that regard.

2 Prima facie under all the case law that I've
3 cited, this is a railway use. And the Board had that
4 information in that regard, and they should not have
5 stopped this.

6 That doesn't mean that whether it's -- and
7 the consent orders don't prevent this or Judge
8 Stanton's initial ruling. It doesn't mean that the
9 town cannot get if they seek to a definitive opinion on
10 this issue from the Surface Transportation Board.

11 If you look at Judge Stanton's oral decision,
12 what he says is, this is preempted, and, Board, you
13 can't stop it. That was his ruling. In his oral
14 decision, that's what he's saying. So he's basically
15 saying, and, of course, which was picked up by the
16 Supreme Court and the Appellate Division that, I don't
17 really have jurisdiction to decide this and, Board,
18 you, therefore, can't stop it, it's preempted, but you
19 can look at health and safety issues in that regard.

20 Let's just pick up -- I'm looking at his
21 court decision. This is at Page 5 of his decision.
22 "Applying this general conceptualization to what was --
23 what has occurred here, it seems clear to me that only
24 the National Surface Transportation Board has the right
25 to determine whether a facility like this may be

1 operated by the railroad at this site. I'm not sure
2 whether they have a permitted process that should have
3 been invoked and wasn't. I do not know what their
4 permitting process is, if any. It's conceivable that
5 they don't have a permitting process and that they have
6 a laissez faire attitude with respect to this. This
7 may or may not be good social or legal policy, but the
8 reality is that the federal government is dismantling
9 substantial areas of economic regulation."

10 So what he's basically saying is what I'm
11 saying. Whether or not this is good law and whether or
12 not we can argue whether the Planning Board or town
13 should have the ability to have more interference here
14 has passed us by. States can't interfere with it.

15 So that's the decision of this Court. The
16 railway can go forward with their facility.

17 Now my only question in that regard is has
18 the Planning Board since they had the three -- I read
19 the transcripts. I'm certainly going through them as
20 best I could, and there was this question whether there
21 were any other issues. But has that all been decided,
22 or do they need to at least go back to the Board to
23 talk about hours of operation or --

24 MR. BARBARULA: No, Judge. It hasn't been
25 completely. There was a number of concessions that the

1 applicant would make in terms of the operating
2 procedures by adopting the testimony of Mr. Formica
3 'cause Mr. Formica indicated that he's not 24 hours.
4 Mr. Feno indicated that. However, the brick come in
5 24/7 whenever it comes in.

6 THE COURT: I read that. Yeah.

7 MR. BARBARULA: Right.

8 THE COURT: But that's what I was concerned
9 with.

10 MR. BARBARULA: So I would say that based
11 upon the Court's ruling here that it is still necessary
12 for them to come back one more time. I will address
13 this with the Board, and I will list what we need and
14 don't need to give a listing of what we want to talk
15 about in terms of the health. I think we've already
16 looked at one thing that was very critical, and that
17 was the pipeline. That -- that obviously cannot -- it
18 has to be regulated in terms of the --

19 THE COURT: Yeah.

20 MR. BARBARULA: -- amount of weight on that.
21 There were also certain issues that weren't concluded,
22 and that was the re-institution of fencing and
23 landscaping that was initially in the facility, went
24 into disrepair, and stopped. That has to be addressed.

25 THE COURT: And the Board has to make final

1 decision --

2 MR. BARBARULA: Right.

3 THE COURT: -- and resolution --

4 MR. BARBARULA: Right.

5 THE COURT: -- resolution in this respect.

6 MR. BARBARULA: So I would say that based
7 upon what you -- what you have just enumerated on the
8 record that there should be one more hearing. I will
9 advise the Board that the Court's decision is that
10 regardless of what the town does in terms of a
11 decision, we must proceed. And I would advise counsel
12 when they could come back and what information we would
13 seek.

14 MR. FIORILLA: Your Honor, there -- they did
15 have a resolution which dismissed -- dismissed our
16 application --

17 THE COURT: Yes.

18 MR. FIORILLA: -- without prejudice.

19 MR. BARBARULA: I -- I assume that the Board
20 by this action reinstated --

21 THE COURT: Right.

22 MR. BARBARULA: -- that application.

23 THE COURT: Right.

24 MR. FIORILLA: Okay. Your Honor, we assume
25 -- we assume we --

1 THE COURT: I -- I think I do have to remand
2 this to the Board. I mean, they have to finish their
3 job in terms of health and safety issues.

4 MR. FIORILLA: Well --

5 THE COURT: And there may be issues regarding
6 fencing or hours of operation.

7 MR. FIORILLA: Well, those were -- those were
8 items that we were willing to discuss with them --

9 THE COURT: Yes.

10 MR. FIORILLA: -- at that time. I --

11 THE COURT: Right. I realize that.

12 MR. FIORILLA: We're not -- we're not denying
13 that.

14 THE COURT: No. I --

15 MR. FIORILLA: But we would like to be able
16 to operate in the meantime.

17 THE COURT: Pardon?

18 MR. FIORILLA: We -- we would like to be able
19 to operate in the meantime.

20 THE COURT: Well, what period of time are we
21 talking? We -- I -- this can be done in the next 30
22 days or what?

23 MR. BARBARULA: We believe -- I believe that,
24 Judge, that our end of October meeting would probably
25 be available. If they're going to operate, I would not

1 want them to put anything on the pipeline until --

2 THE COURT: No. I -- I think --

3 MR. BARBARULA: -- we get an agreement on
4 that.

5 THE COURT: You need to go back --

6 MR. BARBARULA: But there's plenty of other
7 --

8 THE COURT: Look, I have to remand --

9 MR. FIORILLA: The last time, it took them 18
10 months. We came back 18 times.

11 THE COURT: Yeah, but --

12 MR. BARBARULA: No.

13 THE COURT: I'm going to do what Judge
14 Stanton did. I'm going to put a time limit on this
15 even though it wasn't honored. It will be honored,
16 okay, because you want to stop operating.

17 MR. FIORILLA: And the judge (indiscernible)
18 --

19 THE COURT: So I'll say it's got to be done
20 --

21 MR. BARBARULA: Let's -- let's not digress to
22 the playground here. Judge, I'm indicating to you --

23 THE COURT: (Indiscernible) negotiations.

24 MR. BARBARULA: Yes. Look, it's a different
25 situation. I think that what the Court has done here

1 is to give the Board clear and -- direction. What I'm
2 saying is that I believe at the end of October, we
3 could get them back. The Court can certainly put
4 restrictions in terms of a time frame.

5 THE COURT: Well, 60 days. It's got to be
6 done in 60 days.

7 MR. BARBARULA: All I'm asking is that since
8 there isn't a clear consensus of the weight and -- I
9 mean, they wanted to limit it to I think the three
10 stacks. I would -- I would -- if the Court's going to
11 allow them to operate which I believe that's what
12 you're saying, I'd like them to stay away from putting
13 any more than one or two stacks on the pipeline until
14 we get a provision. There's plenty of land there.

15 THE COURT: I'm not going to stop them from
16 operating based upon everything that I've said and the
17 reasons why, but that doesn't mean that the Board
18 doesn't have a function on health and safety issues.
19 So it's subject to health and safety issues. However,
20 I'm going to put a 60-day time limit on this --

21 MR. BARBARULA: Fine.

22 THE COURT: -- okay, for it to be done. I'll
23 retain jurisdiction so that if there is some
24 disagreement after these decisions have been made, you
25 can come right back before me. Okay?

1 MR. BARBARULA: I think it was an agreement
2 between the engineers of how much weight there should
3 be.

4 MR. FIORILLA: I agree.

5 MR. BARBARULA: And I think that needs to be

6 --

7 THE COURT: Well, look.

8 MR. BARBARULA: -- lived up to in the
9 meantime.

10 THE COURT: There are other issues. I mean,
11 I don't know, you know -- we're -- we're talking about
12 health and safety issues in terms of -- and I think
13 Judge Stanton talked about this or somewhere else I
14 read it about whether you have trucks running all
15 night, if gas fumes and everything else --

16 MR. BARBARULA: And the idling of the diesel.
17 Yes, he did, Judge.

18 THE COURT: -- whether -- whether you have,
19 you know, what type of measures are taken in that
20 regard, when are these bricks going to be offloaded, is
21 it 4 in the morning, is that going to create tremendous
22 noise levels. I -- I don't know any of this. These
23 are -- these are things that the Board needs to look at
24 for health and safety reasons, but it has to be
25 reasonable.

1 And that's why I'm retaining jurisdiction.
2 If there are issues with respect to whatever conditions
3 the Board puts on, you can come back before me on those
4 issues. But we need a ruling from the Board 60 -- at
5 least 60 days from today.

6 MR. BARBARULA: No problem, Judge.

7 THE COURT: Okay? All right.

8 MR. FIORILLA: Thank you, Your Honor.

9 THE COURT: So in the meantime, you're not to
10 run the facility until the Board does this.

11 MR. FIORILLA: Whoa, Your Honor, I don't see
12 why that's -- why that's appropriate. We've already
13 agreed about how much weight we're going to put on the
14 pipe, and the other -- there are no other health and
15 safety issues -- major safety issues that were brought
16 to our attention. Now we've already --

17 THE COURT: But didn't they discuss hours of
18 operation?

19 MR. FIORILLA: Yes, we did, and we said what
20 they were. They were --

21 MR. BARBARULA: It wasn't -- there was --
22 there was indications by the applicant that they were
23 willing to do things, but it wasn't made -- it wasn't
24 determined because the Board felt that they had -- they
25 couldn't go forward. And as you ruled now, not going

1 forward was the delay.

2 Judge, I will make this -- I -- I've already
3 written as we sat here a memo that I will -- I will go
4 back to the office and e-mail to the Board. I have --
5 I know I have October available because next Thursday's
6 meeting has been canceled for lack of an agenda --

7 THE COURT: Okay.

8 MR. BARBARULA: -- because of the economic
9 times.

10 THE COURT: So you can hear this at the
11 October meeting.

12 MR. BARBARULA: I can hear it -- we could
13 hear it at the October, and I -- I will let counsel
14 know now that one of the things that is -- is a problem
15 here is that a type of site plan sealed by an
16 appropriate engineer is -- is an issue, and I don't
17 think that that's an undue burden to get something
18 submitted in that regard. But we have -- we have the
19 facility, and we have the time. Because of the
20 economy, the number of applications has been
21 drastically reduced.

22 And what I'm saying is there was discussions
23 and concessions about what should be put on the -- the
24 pipeline, and, you know, I can see counsel's viewpoint,
25 but we can rule very quickly.

1 MR. FIORILLA: Your Honor, I don't believe --

2 THE COURT: Well, how could you operate the
3 -- what about this pipeline or whatever?

4 MR. FIORILLA: Well --

5 THE COURT: How could you operate anyway?
6 What's the practical effect here of all this?

7 MR. FIORILLA: Your Honor, could I ask --

8 THE COURT: Sure.

9 MR. FIORILLA: Do you mind if I --

10 MR. FENO: I'm sorry, Your Honor. Nathan
11 Feno. The concern about the pipelines, there's --
12 there's -- there's a water aqueduct under --
13 underground that we would be putting brick on. Our
14 engineers and the engineers for the North Jersey Water
15 District Commission which is the owner of the pipeline
16 consulted. Everyone has agreed as to what's allowed on
17 the pipeline, both the railroad and the -- and the
18 owner of the pipeline which is obviously, you know,
19 presumably knowledgeable. We've committed to the town
20 in writing that we will follow those restrictions.
21 There is no issue about that.

22 There is no issue about hours of operation.
23 We've committed to the town what the hours of operation
24 will be for trucks coming in and out.

25 THE COURT: Oh, you have?


1 MR. FENO: Absolutely.
2 THE COURT: In writing?
3 MR. FIORILLA: Yes.
4 MR. FENO: In writing.
5 MR. FIORILLA: In writing. Yes.
6 MR. BARBARULA: Judge, that -- that was part
7 of the ongoing process. I don't see there's any -- any
8 adverse economic impact for the Board -- Board to make
9 a ruling in October.
10 THE COURT: All right.
11 MR. BARBARULA: And, you know, if need be,
12 we'll do it at the first --
13 THE COURT: Six weeks from --
14 MR. FENO: It's continued delay, Your Honor.
15 It's really --
16 MR. FIORILLA: That's what it is.
17 THE COURT: Well --
18 MR. BARBARULA: Then make it -- Judge, then
19 make it less. Make it 45 days. That gives me three
20 possible hearings. October 1st is a Thursday or 2nd?
21 1st? October 1st I think, that gives --
22 THE COURT: Yeah. That's a Thursday.
23 MR. BARBARULA: That gives me that -- that
24 meeting, it gives me the last meeting in October which
25 is the fourth Thursday --

1 THE COURT: Fine.
2 MR. BARBARULA: The first --
3 THE COURT: Forty-five days.
4 MR. BARBARULA: Forty-five days and that way,
5 there's appropriate comment here.
6 THE COURT: All right. I --
7 MR. BARBARULA: Thank you, Your Honor.
8 THE COURT: I -- I think these things do have
9 to be flushed out. I mean, I think our case law is
10 clear in that regard. I -- I'm not -- I'm certainly
11 not going to change that, and I don't want rush. I
12 recognize the amount of time that's gone by here, but
13 you also now have a decision from this Court that the
14 Board cannot stop your facility. It's only a question
15 of reasonable health and safety issues, and I'm
16 retaining jurisdiction. So this matter will move
17 quickly. All right?
18 MR. BARBARULA: Very good, Judge.
19 THE COURT: Forty-five -- I'll need an order.
20 You're going to prepare the order?
21 MR. FIORILLA: Yes, Your Honor.
22 MR. BARBARULA: Thank you, Your Honor.
23 THE COURT: You'll prepare the order on five
24 days' notice. Okay?
25 MR. BARBARULA: Thank you, Your Honor.

1 THE COURT: All right.
2 MR. OOSTDYK: Thank you.
3 THE COURT: Thank you all.
4 (Proceedings concluded)
5 * * * * *

CERTIFICATION

6
7
8
9 I, Valerie Anderson, the assigned transcriber, do
10 hereby certify the foregoing transcript of proceedings
11 in the Morris County Superior Court, Law Division, on
12 September 16, 2009, on Videotape No. 9/16-2, Index Nos.
13 from 10:29 to 11:49, is prepared in full compliance
14 with the current Transcript Format for Judicial
15 Proceedings and is a true and accurate compressed
16 transcript of the proceedings as recorded.
17

18
19 
20
21 Valerie Anderson, AOC #480
22 METRO TRANSCRIPTS, L.L.C.
23

24 Date: 9/25/09
25

EXHIBIT 7

ENTERED ON AGEND

FILED

SEP 28 2009

B. THEODORE BOZONELIS, A.J.S.C.
JUDGE'S CHAMBERS
MORRIS COUNTY COURTHOUSE

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Attorneys for the Borough of Riverdale Planning Board

Borough of Riverdale	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	MORRIS COUNTY
	:	
vs.	:	
	:	Docket No.: MRS-L-2297-96
The New York Susquehanna and	:	
Western Railway Corporation, a	:	Civil Action
New Jersey Corporation	:	
	:	
Defendant.	:	ORDER FOR ENFORCEMENT OF
	:	LITIGANT'S RIGHTS

THIS MATTER having been opened to the Court by John K. Fiorilla, Esq., of Capehart & Scatchard, P.A., attorneys for Defendant, The New York Susquehanna and Western Railway Corporation ("NYSW") and John M. Barbarula, Esq., of Barbarula Law Offices appearing for the Borough of Riverdale Planning Board and Robert H. Oostdyk of Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco and Appelt, P.C., appearing for the Borough of Riverdale and argument having been heard on September 16, 2009 that the Court finds:

1. The storage of goods in transit by a railroad on railroad property as part of a transloading operation constitutes "transportation" by rail carrier pursuant to 49 USC § 1501 (b); and
2. The Defendant has made a prima facie case that the brick transload operation it wishes to conduct at its Riverdale facility constitutes "transportation" by rail carrier pursuant to 49 USC § 10501 (b); and

3. The Borough of Riverdale Planning Board has no authority to make a finding of federal preemption under 49 USC § 10501 (b) a precondition for the Board's consideration of health and safety issues regarding a railroad's operation of its facility; and
4. The Borough of Riverdale has the right to pursue jurisdiction questions through the Surface Transportation Board. Nothing herein shall be construed as impeding the Borough's right. This Order shall not be proof of preemption. The parties are left to their proofs before the Service Transportation Board; and therefore

IT IS on this 28th day of September, 2009

1. ORDERED, that the Borough of Riverdale Planning Board shall reinstate the Application of the Defendant pursuant to the Consent Order dated July 22, 1998, to operate its Riverdale facility as a transload facility for the movement of brick; and it is
2. ORDERED, that the Borough of Riverdale Planning Board shall conduct a hearing with the Defendant and review the health and safety issues regarding the operation of the facility for transloading bricks, and render a resolution within forty-five (45) days from the date of the entry of the within Order but no later than November 6, 2009; and it is
3. ORDERED, that the existing Consent Order remains in full force and effect; and it is further
4. ORDERED, that ^{subject to} ~~after complying with~~ the Borough of Riverdale Planning Board ^{on health and safety issues} Resolution, the operations of Defendant may commence at once; and it is further

5. ORDERED, that if it appears that the Borough of Riverdale Planning Board will not or cannot come to a resolution of these issues with the Defendant, or if it appears that no resolution will be reached within forty-five (45) days of this Order, then upon notice from one or both of the parties, the Court will schedule a further hearing in this matter no later than November 9, 2009; and it is further
6. ORDERED, that the Court shall retain jurisdiction in this matter; and it is further
7. ORDERED, that a copy of the within Order shall be served upon all counsel of record within 7 days of the receipt of the filed Order by Plaintiff's counsel.

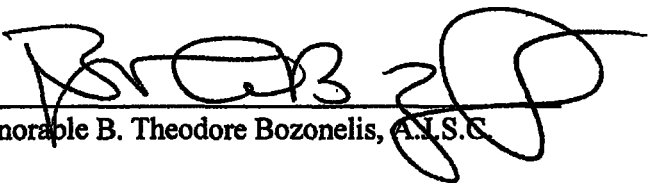

Honorable B. Theodore Bozonelis, A.J.S.C.

EXHIBIT 8

RAIL CAR TRANSLOADING CONTRACT

THIS AGREEMENT made as of this 31st day of July, 2009, by and between TRI STATE BRICK, INC., with offices at 151 West 25th Street New York, NY 10001 (hereinafter referred to as "TRI-STATE") and THE NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORPORATION, a New Jersey corporation with offices at 1 Railroad Avenue, Cooperstown, New York 13326 (hereinafter referred to as "NYS&W").

WHEREAS, NYS&W is an interstate carrier by rail and has an existing rail-to-truck transloading facility (the "Facility") at certain real property owned by NYS&W and accessed via Hamburg Turnpike, Riverdale, New Jersey, as more particularly described on Exhibit A annexed hereto; and

WHEREAS, TRI-STATE wishes to make arrangements with NYS&W for (a) NYS&W to transport railcar shipments of brick (the "Commodity") to the Facility; (b) NYS&W to transload the Commodity between truck and rail at the Facility; (c) NYS&W to provide temporary storage in transit of the Commodity at the Facility, and (d) NYS&W to perform administrative functions related to the transportation of the Commodity.

NOW, THEREFORE, in consideration of a mutual exchange of promises and other valuable consideration, the receipt of which is acknowledged by the parties, the parties hereto covenant and agree as follows:

1. CONSTRUCTION OF FACILITY; PERFORMANCE OBLIGATIONS; PROPERTY:

1.1 The Facility currently exists, but was designed to transload liquid commodities. NYS&W and TRI-STATE have cooperated to design modifications to the Facility that are needed to handle the Commodity efficiently and effectively, as shown on Exhibit A. Those modifications will be constructed by contractors selected by NYS&W.

1.2 NYS&W will perform the transportation services, including without limitation transloading services, as requested by and for the benefit of TRI-STATE, as set forth herein. NYS&W will designate space within the Facility sufficient for and facilities and equipment (the "Equipment") needed for handling the Commodity, as well as NYS&W's performance of all its obligations under this Agreement. NYS&W is responsible for all improvements to the Facility, including without limitation all Equipment at the Facility.

1.3 During the Term of this Agreement, NYS&W acknowledges that it shall not perform transloading services at the Facility for the benefit of any person other than TRI-STATE unless such services can be performed in a manner which does not impede in any way NYS&W's handling of commodity tendered by TRI-STATE. In consideration of NYS&W's commitment of the capacity of the Facility for traffic arranged by Tri-State, Tri-State agrees to arrange for no fewer than Two Hundred Fifty (250) loaded railcars of Commodity to be shipped to the Facility during each year of this Agreement. In the event that fewer than Two Hundred Fifty (250) loaded railcars of Commodity are

shipped to the Facility in any year of this Agreement, then Tri-State shall pay to NYS&W a sum determined by multiplying the difference between the actual number of railcars shipped and Two Hundred Fifty (250) by Five Hundred Dollars (\$500.00).

1.4 NYS&W hereby grants to TRI-STATE the right to access the Facility solely for purposes directly related to the transportation of the Commodity, including such actions as inspecting the Commodity for damage, review of NYS&W's unloading and loading procedures, and inspection of shipping documents.

2. FREIGHT RATES:

Rail freight rates are to be determined by the NYS&W rate circular or private contract then in effect.

3. RAILROAD TRANSLOADING:

3.1 NYS&W hereby agrees that it, or an entity it engages ("Loader"), shall perform bulk loading /unloading of the Commodity, as well as any and all other services required during, and as part of, transporting the Commodity, including without limitation receiving, unloading the Commodity at the Facility, operating equipment, maneuvering railcars over and across the Facility, temporarily storing Commodity, loading Commodity onto trucks for delivery off site, completing all appropriate paperwork, and complying with all applicable laws and regulations governing rail transportation (hereafter and collectively, the "Services").

3.2 Unloading of railcars by NYS&W or Loader shall follow operating procedures mutually acceptable to NYS&W and TRI-STATE.

4. TRANSPORTATION AND LOADING:

4.1 In order to assure that unloading of railcars and loading of trucks is performed in a manner acceptable to TRI-STATE, TRI-STATE may station one or more representatives in the location within the Facility to observe such operations.

4.2 TRI-STATE will make all arrangements for trucks to transport the Commodity from the Facility. Neither TRI-STATE nor its trucking contractor may, without prior written permission of NYS&W, store motor trucks or trailers at the Facility, fuel road vehicles at the Facility, or store bulk materials at the Facility.

4.4 TRI-STATE and NYS&W shall ensure that their respective employees, agents and contractors comply with the NYS&W's rules governing safety and other operating issues at the Facility.

[4.5 TRI-STATE and NYS&W agree to meet no less than quarterly to review the operation of the Facility and the costs of the Services to make equitable adjustments in the Actual Costs (as

defined below) to reflect operating efficiencies or inefficiencies, changes in law or application of law, legally enforceable orders of governmental authorities, changes in rates of pay, material costs and unanticipated expenses. If either party should suffer a material inequity in the performance or service level of its obligations under this Agreement as a result of adverse and unforeseen conditions, then the parties hereto shall renegotiate in good faith for the purpose of resolving such inequity, provided that until such renegotiation is concluded, the Actual Costs being charged at the time either party requests a renegotiation shall remain in effect. Any changes to the terms of this Agreement agreed to by NYS&W and TRI-STATE shall be memorialized in writing as an Amendment hereto and signed by the authorized representatives of NYS&W and TRI-STATE.]

5. TERM / FEE:

5.1 The initial term of this Agreement shall for a period of five (5) years beginning with its effective date. Unless terminated as provided in Section 5.2, this Agreement shall thereafter automatically renew for renewal terms of 12 months each.

5.2 No less than one hundred twenty (120) days prior to the expiration of the initial or any renewal term of this Agreement, either party may give notice of its intention to terminate this Agreement.

5.3 TRI-STATE shall pay to NYS&W an amount equal to NYS&W's actual reasonable costs in providing Services to TRI-STATE determined in accordance with 23 CFR Part 140, Subpart I (collectively, the "Actual Costs"). Such payments shall be made on a weekly basis by wire transfer to an account designated by NYS&W within seven (7) days of receipt of a detailed line item invoice from NYS&W for such Actual Costs. TRI-STATE shall have the right, at its own cost, on reasonable notice and at a mutually agreeable time, to inspect and audit NYS&W's books relating to the Actual Costs, and any corrections or adjustments in TRI-STATE's favor will be credited to TRI-STATE as against future payments of Actual Costs.

6. OPERATIONS:

6.1 NYS&W or Loader will provide all labor, equipment and tools necessary to accomplish the function of transfer of Commodity from trucks to railcars in a manner consistent with this Agreement.

6.2 NYS&W or Loader will provide personnel sufficient to accomplish the functions of transfer of Commodity between trucks and railcars and all associated administrative functions in a manner consistent with this Agreement.

6.3 NYS&W will maintain records and receipts for railcars it unloads identifying the following:

- i. car number;
- ii. shipper;

iii. commodity.

6.4 TRI-STATE, its officers, employees and invitees, while in proximity to rail tracks, shall follow, observe and be governed by railroad safety rules as applicable.

[6.5 NYS&W shall monitor and inspect all unloading/loading equipment at reasonable intervals and shall, immediately upon discovery of any damage or malfunction thereof, notify TRI-STATE of needed repairs and any effect on operations. NYS&W shall arrange and pay for all repairs made to the unloading/loading equipment.]

7. *INDEPENDENT CONTRACTOR STATUS:*

It is the intent of the parties that NYS&W (including Loader) is and shall remain an independent contractor with respect to TRI-STATE. Neither NYS&W nor any employee, other worker, or entity engaged by NYS&W shall be deemed an employee or agent of TRI-STATE under any circumstances or for any purpose, including, but not limited to, federal, state or local payroll taxes, income tax withholding, workers compensation premiums, unemployment tax or TRI-STATE provided benefits of employment. This independent contractor relationship of the parties is paramount to this Agreement, and nothing herein contained shall be construed as inconsistent therewith.

9. *INDEMNIFICATION:*

9.1 TRI-STATE will be responsible for and will indemnify, save harmless and defend NYS&W and each of its officers, shareholders, directors, employees and agents against and from any and all claims and suits for, and any and all liability, loss or expense (including reasonable attorneys fees) arising from or incidental to or in connection with, damage to or loss of property of NYS&W, TRI-STATE, or of agents, servants or employees of either, or of any other person, and against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, injury to or death of persons, including agents, servants, or employees of NYS&W or of Loader, or any other person (including Loader, if a natural person), which said damage, loss injury or death shall arise in any manner, directly or indirectly, out of or incidental to or in connection with, TRI-STATE employees being on NYS&W property, except to the extent caused by the negligent or intentional acts or omissions of NYS&W or other entities allowed to use the Facility by NYS&W pursuant to this Agreement.

9.2 NYS&W will be responsible for and will indemnify, save harmless and defend TRI-STATE and each of its officers, members, managers, employees and agents against and from any and all claims and suits for, and any and all liability, loss or expense (including reasonable attorneys fees) arising from or incidental to or in connection with, damage to or loss of property of TRI-STATE, NYS&W, or of agents, servants or employees of either, or of any other person, and against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, (a) injury to or death of persons, or damage to property, including agents, servants, or employees of TRI-STATE or of Loader, or any other person (including Loader, if a natural person), which said damage, loss injury or death shall arise in any

manner, directly or indirectly, out of or incidental to or in connection with, the transloading operation being performed by NYS&W or Loader at the Property, except to the extent caused by the negligent or intentional acts or omissions of TRI-STATE, (b) any environmental or other conditions on the Property, and (c) the operations of any other person or company on the Property during the Term.

10. INSURANCE:

10.1 TRI-STATE shall provide and maintain in effect during the Term a policy of public liability insurance including contractual liability covering liability assumed by TRI-STATE under the provisions of the foregoing Section 9 of this Agreement. Said insurance shall be in limits of not less than \$5,000,000.00 combined single limit, and shall be in companies and forms acceptable to NYS&W.

10.2 TRI-STATE shall furnish to NYS&W certificates of all required insurance policies upon request of NYS&W. All such policies shall be endorsed to provide not less than thirty (30) days' notice to NYS&W of any cancellation thereof and of any material change in coverage.

10.3 The providing of said insurance coverages shall not be deemed a limitation on the liability of TRI-STATE as provided in this Agreement, but shall be additional security therefor.

10.4 NYS&W may, from time to time, require increased limits of insurance to reflect changes in the Consumer Price Index since the last such increase.

10.5 NYS&W, Loader and any other person using the Property with the permission of NYS&W shall provide and maintain in effect during the Term a policy of public liability insurance including contractual liability covering liability assumed by NYS&W and Loader under the provisions of the foregoing Section 9 of this Agreement. Said insurance shall be in limits of not less than \$5,000,000.00 combined single limit, and shall be in companies and forms acceptable to TRI-STATE, and shall name TRI-STATE and its officers, members, managers, employees and agents as additional insureds.

10.6 NYS&W shall furnish to TRI-STATE certificates of all required insurance policies upon request of TRI-STATE. All such policies shall be endorsed to provide not less than thirty (30) days' notice to TRI-STATE of any cancellation thereof and of any material change in coverage.

10.7 The providing of said insurance coverages shall not be deemed a limitation on the liability of NYS&W as provided in this Agreement, but shall be additional security therefor.

10.8 TRI-STATE may, from time to time, require increased limits of insurance to reflect changes in the Consumer Price Index since the last such increase.

11. ENVIRONMENTAL REGULATIONS:

11.1 TRI-STATE covenants that it will not release or dispose of any hazardous or explosive (a) chemical, (b) impurity, (c) waste, or (d) other substance on or near the Facility, provided that it is acknowledged that TRI-STATE is the business of causing Commodity to be delivered to the Facility to be shipped by truck from the Facility. In the event that any court, duly constituted public authority, municipality or agency enters a final and incontestible order or judgment against NYS&W for any such release or disposal by TRI-STATE so long as NYS&W neither authorized nor sanctioned the same, then TRI-STATE shall indemnify and hold NYS&W harmless for all expenses associated with compliance with said judgment to include, but not be limited to, any required clean-up and/or restoration cost of the site to a safe condition together with NYS&W's reasonable costs, attorneys' fees or other costs of litigation.

11.2 Notwithstanding Section 11.1 above, TRI-STATE shall not be responsible for or indemnify NYS&W for any such release or environmental condition, and NYS&W shall indemnify and hold TRI-STATE and its officers, members, managers, employees and agents harmless from and against all costs, liabilities and expenses (including reasonable attorneys fees) for any such release or environmental condition, which (i) predates this Agreement, (ii) is caused by or is the result of any act or omission of NYS&W, its agents, contractors or invitees, (iii) is caused by or is the result of any act or omission of any third person over whom TRI-STATE has no authority or control, including, but not limited to, any person who supplies or furnishes railroad cars that are the effective cause of the release or disposal of said substances, or (iv) is caused by any other person having use of or operating at the Property.

11.3 NYS&W shall conduct all of its operations in compliance with all applicable environmental statutes, ordinances, rules, regulations and requirements of all federal, state and local governmental authorities, and the various departments thereof, now existing or hereafter created.

12. REPRESENTATIONS AND WARRANTIES:

12.1 NYS&W is a person as defined in 49 U.S.C. § 10102(5) that provides common carrier railroad transportation and has been issued a certificate or license, approved pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency) or otherwise has been recognized as a rail carrier by such agency.

12.2 NYS&W has the full corporate power and authority to execute, deliver and perform its obligations under this Agreement. This Agreement constitutes the valid and binding agreement of NYS&W, enforceable in accordance with its terms.

12.3 TRI-STATE has the full limited liability company power and authority to execute, deliver and perform its obligations under this Agreement. This Agreement constitutes the valid and binding agreement of TRI-STATE, enforceable in accordance with its terms.

13. ASSIGNING:

Neither party shall assign or transfer this Agreement in whole or in part, without the written consent thereto by the other party, such consent not to be unreasonably withheld, conditioned or

delayed, provided, however, that NYS&W shall have the right to assign this Agreement pursuant to any merger of NYS&W or sale of stock or all or substantially all of the assets of NYS&W to a railroad licensed by the Surface Transportation Board. Any assignment or transfer of this Agreement shall not affect any obligations of either party hereunder arising prior to such assignment or transfer. Any assignment or transfer of this Agreement shall not be effective until delivery of a written assumption of the assignor's obligations under this Agreement signed by the assignee/transferee in form reasonably acceptable to the non-assigning party. For the purposes of this Agreement, a sale or change in control of either party shall be considered an assignment of this Agreement.

14. DEFAULT:

Default is defined as the failure to discharge any of the covenants herein. If either party to this Agreement fails to correct any default hereunder within thirty (30) days after written notice to do so (unless a longer period is otherwise specified herein), or, if such default cannot with commercially reasonable best efforts be cured within thirty (30) days then as soon thereafter as possible, the party serving such notice may unilaterally terminate this Agreement forthwith. Waiver of any default shall not be construed as a waiver of either a subsequent or continuing default.

The actions and remedies provided in this Agreement in case of default shall not be deemed exclusive but shall be in addition to all other actions and remedies at law or in equity in case of any such default; and no action or remedy taken or omitted by NYS&W or by TRI-STATE in case of default shall be deemed a waiver of such default and waiver of a particular default shall not be deemed a waiver of any other default or a waiver of the same default again occurring, nor shall any failure on the part of NYS&W or by TRI-STATE to compel a fulfillment of any one or more of the covenants, terms and conditions herein contained be held to be a waiver of its right to enforce the same at any time thereafter during the term, or any continued term, of this Agreement.

15. SEVERABILITY:

The provisions of this Agreement are severable and it is the intention of the parties hereto that if this Agreement cannot take effect in its entirety because of the final judgment of any court of competent jurisdiction holding invalid any part or parts thereof, the remaining provisions of this Agreement shall be given full force and effect as completely as if the part or parts held invalid had not been included therein.

16. FORCE MAJEURE:

In the event that either TRI-STATE or NYS&W is unable to perform as stated in this Agreement due to or as a result of one or more of the following causes: acts of God, including but not limited to floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; act of public enemy, war, blockade, insurrection, riot, vandalism or sabotage; fire, accident, wreck, derailment, washout, or explosion; strike, lockout or labor dispute; embargoes or AAR service orders; or governmental laws, orders (including court orders) or regulations, this Agreement shall be suspended only insofar as said performance is affected by the described cause

and only for the duration of such cause.

17. THIRD-PARTY MODIFICATION:

In the event that the Surface Transportation Board ("STB") or any other governmental authority having jurisdiction shall issue or adopt (or issue or publish notice of its intention of any such issuance of adoption) any law, order, rule or regulation, the effect of which shall be to modify, amend, cancel or terminate any or all of this Agreement, either party shall promptly deliver to the other a full and complete copy thereof; provided, however, that neither party shall seek such action by the STB or other government authority.

18. NOTICES:

Any notice required or permitted to be given under the terms, conditions and provisions of this Agreement shall be in writing and considered as having been given upon the mailing thereof by certified mail, return receipt requested, to the office address of the other party set forth above, or to such other address as such party may from time to time specify in writing. Each such notice shall be effective on the date actually received, as indicated on the receipt therefor.

Notice shall be given as follows:

If to NYS&W: President
 The New York, Susquehanna & Western Railway Corporation
 1 Railroad Avenue
 Cooperstown, New York 13326

If to TRI-STATE: President
 TRI STATE BRICK, INC.
 151 West 25th Street
 New York, NY 1000

19. APPLICABLE LAW:

This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey, without regard to its conflict of law principles.

20. ENTIRE AGREEMENT; AMENDMENTS:

This Agreement contains the entire agreement of the parties relating to NYS&W transloading of bulk materials between railcars and trucks at the Property. Any purported amendment hereto shall not be effective unless it shall be set forth in writing and executed by both parties.

[The balance of this page intentionally left blank]

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto have caused this Agreement to be executed by their duly authorized respective representatives on the day and year first above written.

THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION

By: 

Name: NATHAN R. FANO

Title: PRESIDENT

TRI-STATE BRICK, INC.

By: 

Name: Louis Formica

Title: CFO